

***United States Court of Appeals
for the Second Circuit***



APPENDIX

76-1398

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 76-1398

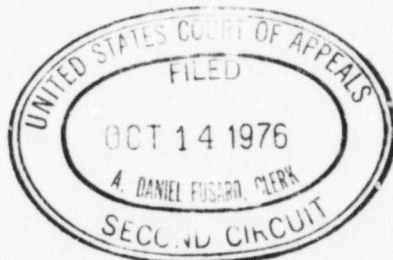
UNITED STATES OF AMERICA,
Plaintiff-Appellee,
—against—

DIAPULSE CORPORATION OF AMERICA, also known
as THE DIAPULSE MANUFACTURING CORPORATION
OF AMERICA, a corporation, JESSE ROSS,
President of the corporation and JOSEPH I. ROSS,
Vice-President and Treasurer of the corporation,
Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

APPELLANTS' APPENDIX

COPAL MINTZ
Attorney for Defendants-Appellants
150 Broadway
New York, N.Y. 10038
(212) 227-7070



DAVID G. TRAGER
*United States Attorney for the
Eastern District of New York*
225 Cadman Plaza
Brooklyn, N. Y. 11201

B
P/S

PAGINATION AS IN ORIGINAL COPY

INDEX

	PAGES
Docket Entries (3 sets)	i - vii
Order to Show Cause - Criminal Contempt	1
Petition	3
Bill of Particulars	9
Notice to Jesse Ross, Pres. Diapulse Corporation of America, July 2, 1975	12
Notice to Joseph I. Ross, Vice-Pres. Treas. Diapulse Corporation of America, October 2, 1975	13
Notice to Jesse Ross, Pres. Diapulse Corporation of America, October 15, 1975	14
Motion for Dismissal, February 23, 1976	15
Memorandum and Order, March 31, 1976	19
Further Bill of Particulars, April 13, 1976	25
Renewal of Motion to Dismiss	39
Memorandum and Order Granting Motion Only as to Paragraph 3	46
Jury's Verdict	47
Post Trial Motion under Rule 39	50
Order Denying the Motion	57
Exceptions to Probation Report on Jesse Ross	58
Judgment of Conviction and Fine Against Jesse Ross	90
Judgment of Conviction and Fine Against Joseph I. Ross	91
Judgment of Conviction and Fine Against Diapulse Corporation of America	92
Notice of Appeal	92(a)

INDEX (Cont'd.)

	PAGES
Amended Notice of Appeal.....	92(b)
Trial Transcript.....	93
Index to Trial Transcript	
Motion to Dismiss.....	94
Concessions.....	99
Government Rested.....	175
Defendants Rested.....	277
Government Rested..	277
Motion for Acquittal.....	277
Colloquy re Proposed Jury Instructions.....	282
Exception by Defendants.....	291
Charge.....	292
Recessing of Jury for the Night.....	306
Colloquy re Jury's Inquiries.....	308
Verdict.....	339 314
Sentencing.....	342 317

Testimony

	Direct	Cross	Redirect	Re-Cross
Murray Kurtzman	101	129	152	154
Harry R. Baukney	154	167		

INDEX (Cont'd.)

Testimony (Cont'd.)

Defense Witnesses

	Direct	Cross	Redirect	Re-Cross
Jesse Ross	177	185	243	248
Joseph I. Ross	251	252	261	
Forest Petterson	262			

GOVERNMENT'S EXHIBITS

APPENDIX

1. FDA Teletype to New York Office, dated June 18, 1975, received in evidence T23 (Appendix 102) reproduced..... 32-38
2. Permanent Injunction, dated July 18, 1976, received in evidence T36 (Appendix 115) not reproduced..... --
3. Transcript or Tape Recording of October 15, 1975 episode (also Defendant's Exhibit C) received in evidence T73 (Appendix 152) reproduced..... 146-152
4. Teletype dated July 2, 1975, received in evidence T79 (Appendix 158) reproduced at T80-82..... 159-161

DEFENDANTS' EXHIBITS

- A Kurtzman FDA Identification Card received in evidence T51 (Appendix 130) --
- B FDA Notice of Inspection dated October 7, 1975, received in evidence T51 (Appendix 130) reproduced 13
- B1 FDA Notice of Inspection dated October 15, 1975, received in evidence T59 (Appendix 138) reproduced 14
- C Same as Government's Exhibit 3, reproduced..... 146-152

INDEX (Cont'd)

APPENDIX

- | | | |
|---|---|----|
| D | Baukney FDA Identification Card received
in evidence T89 (Appendix 168)..... | -- |
| E | Fred J. Masaroff FDA Identification Card
received in evidence T91 (Appendix 170).... | -- |
| G | Letter, Copal Mintz to Diapulse Corporation
of America dated August 14, 1974, received
in evidence T101 (Appendix 180) not re-
produced..... | -- |

Docket Entries - Diapulse

DATE	IV. PROCEEDINGS (continued)	V. EXCLUDABLE DELAY			
		(a)	(b)	(c)	(d)
3-12-76	Govts Reply Memorandum filed.				
3-31-76	By DOOLING J - Memorandum and Order filed that defts motions are denied except that plaintiff is directed to serve a further bill of particulars directed to the questions of whether or not the investigators were authorized to inspect under the decree and what, if any, material they proffered to defts to establish their authority and to show that they had been directed to conduct an inspection under the decree and bounded by its terms. Particulars are to be furnished within two weeks from date.				
4-8-76	Letter filed dated 4-5-76 from Copal Mintz, Esq. returned to Chambers as directed.				
4-13-76	Govts Bill of Particulars filed				
4-20-76	Renewal of motion to dismiss the petition filed (forwarded to Chambers)				
4/21/76	Before DOOLING, J. - Case called- deft and counsel motion to dismiss argued- decision reserved- deft waives speedy trial rule- trial adjd to 6/23/76				
4-28-76	By DOOLING J - Memorandum and Order filed on motion of Bill of Particulars, etc. The charge of Paragraph 3 will not be tried but is stricken as insufficient when read with the bill of particulars (see Order)				
6-28-76	Memorandum filed in behalf of deft.				
6-28-76	Before DOOLING, J. - Case called. Deft & counsel present. Deft renews motion to dismiss. Motion denied. Trial ordered and begun. The jury was selected and sworn in. Both sides open. Govt rests. Deft moves for a judgment of acquittal pursuant to rule 29(a) and renews motion to dismiss the petition as failing to charge an offense. Motions denied. Trial continued to 6-29-76.				
6-29-76	Before DOOLING J - case called - defts & attys present - trial resumed - defts move for judgment of acquittal - denied - Defts summation - Govts summation - jury charged - jury deliberations contd to June 30, 1976				
6-30-76	Before DOOLING, J. - Case called. Trial resumed. Jury deliberations resumed. Deft & counsel present. The jury returned with a verdict of guilty as charged in counts 1 and 2. Jury polled. Jury discharged. Trial concluded. Deft moved for judgment of acquittal on each count notwithstanding the verdict. Motion denied. Bail continued. Sentence adj'd without date.				
7-6-76	Notice of motion for judgment of acquittal filed.				
7-8-76	By DOOLING, J. - Order dtd 7-8-76 denying motions for judgment of acquittal filed on back of motion filed 7-6-76.				
8-23-76	Stenographers transcript filed dated June 28, 1976				
8-27-76	Before DOOLING J - case called - Deft Corp by Joseph Ross Vice Pres and Treasurer & counsel Copal Mintz present - Corp. is fined the sum of \$1,250 on each of counts 1 and 2 making a total fine of \$2500. Execution of fine is stayed pending appeal. Deft advised of right to appeal.				
8-27-76	Judgment and commitment filed				

UNITED DISTRICT COURT - CRIMINAL DOCKET

Felony ☐ JUDGE/Assigned Trial
 Offense ☐ MAGISTRATE
 Misdemeanor ☐ 207 1
 District Office 0713

U. S. vs.

75 CR 9022

Case Filed
 Day Mo. Yr
 26 1 76
 No. of
 3
 Defendants

Docket No.
 734921

JESSE ROSS, President of Corporation

U. S. CODE SECTION

Order to show cause in criminal contempt

CHARGES

MAGR. CASE NO.

BAIL - RELEASE

☐ Personal Rec
☐ Unsecured B
☐ Conditional Release
☐ 10% D
☐ Surety
☐ Collate
☐ Bail Not
☐ Made
☐ Bail Status
☐ Changed
 (See Docket)

☐ Denied
☐ 3rd Party
☐ Custody
☐ PSA

☐ 10% D
☐ Surety
☐ Collate
☐ Bail Not
☐ Made
☐ Bail Status
☐ Changed
 (See Docket)

☐ 10% D
☐ Surety
☐ Collate
☐ Bail Not
☐ Made
☐ Bail Status
☐ Changed
 (See Docket)

☐ 10% D
☐ Surety
☐ Collate
☐ Bail Not
☐ Made
☐ Bail Status
☐ Changed
 (See Docket)

☐ 10% D
☐ Surety
☐ Collate
☐ Bail Not
☐ Made
☐ Bail Status
☐ Changed
 (See Docket)

☐ 10% D
☐ Surety
☐ Collate
☐ Bail Not
☐ Made
☐ Bail Status
☐ Changed
 (See Docket)

☐ 10% D
☐ Surety
☐ Collate
☐ Bail Not
☐ Made
☐ Bail Status
☐ Changed
 (See Docket)

☐ 10% D
☐ Surety
☐ Collate
☐ Bail Not
☐ Made
☐ Bail Status
☐ Changed
 (See Docket)

☐ 10% D
☐ Surety
☐ Collate
☐ Bail Not
☐ Made
☐ Bail Status
☐ Changed
 (See Docket)

☐ 10% D
☐ Surety
☐ Collate
☐ Bail Not
☐ Made
☐ Bail Status
☐ Changed
 (See Docket)

☐ 10% D
☐ Surety
☐ Collate
☐ Bail Not
☐ Made
☐ Bail Status
☐ Changed
 (See Docket)

☐ 10% D
☐ Surety
☐ Collate
☐ Bail Not
☐ Made
☐ Bail Status
☐ Changed
 (See Docket)

☐ 10% D
☐ Surety
☐ Collate
☐ Bail Not
☐ Made
☐ Bail Status
☐ Changed
 (See Docket)

☐ 10% D
☐ Surety
☐ Collate
☐ Bail Not
☐ Made
☐ Bail Status
☐ Changed
 (See Docket)

☐ 10% D
☐ Surety
☐ Collate
☐ Bail Not
☐ Made
☐ Bail Status
☐ Changed
 (See Docket)

☐ 10% D
☐ Surety
☐ Collate
☐ Bail Not
☐ Made
☐ Bail Status
☐ Changed
 (See Docket)

☐ 10% D
☐ Surety
☐ Collate
☐ Bail Not
☐ Made
☐ Bail Status
☐ Changed
 (See Docket)

☐ 10% D
☐ Surety
☐ Collate
☐ Bail Not
☐ Made
☐ Bail Status
☐ Changed
 (See Docket)

☐ 10% D
☐ Surety
☐ Collate
☐ Bail Not
☐ Made
☐ Bail Status
☐ Changed
 (See Docket)

☐ 10% D
☐ Surety
☐ Collate
☐ Bail Not
☐ Made
☐ Bail Status
☐ Changed
 (See Docket)

☐ 10% D
☐ Surety
☐ Collate
☐ Bail Not
☐ Made
☐ Bail Status
☐ Changed
 (See Docket)

☐ 10% D
☐ Surety
☐ Collate
☐ Bail Not
☐ Made
☐ Bail Status
☐ Changed
 (See Docket)

☐ 10% D
☐ Surety
☐ Collate
☐ Bail Not
☐ Made
☐ Bail Status
☐ Changed
 (See Docket)

☐ 10% D
☐ Surety
☐ Collate
☐ Bail Not
☐ Made
☐ Bail Status
☐ Changed
 (See Docket)

☐ 10% D
☐ Surety
☐ Collate
☐ Bail Not
☐ Made
☐ Bail Status
☐ Changed
 (See Docket)

☐ 10% D
☐ Surety
☐ Collate
☐ Bail Not
☐ Made
☐ Bail Status
☐ Changed
 (See Docket)

☐ 10% D
☐ Surety
☐ Collate
☐ Bail Not
☐ Made
☐ Bail Status
☐ Changed
 (See Docket)

☐ 10% D
☐ Surety
☐ Collate
☐ Bail Not
☐ Made
☐ Bail Status
☐ Changed
 (See Docket)

☐ 10% D
☐ Surety
☐ Collate
☐ Bail Not
☐ Made
☐ Bail Status
☐ Changed
 (See Docket)

☐ 10% D
☐ Surety
☐ Collate
☐ Bail Not
☐ Made
☐ Bail Status
☐ Changed
 (See Docket)

☐ 10% D
☐ Surety
☐ Collate
☐ Bail Not
☐ Made
☐ Bail Status
☐ Changed
 (See Docket)

☐ 10% D
☐ Surety
☐ Collate
☐ Bail Not
☐ Made
☐ Bail Status
☐ Changed
 (See Docket)

☐ 10% D
☐ Surety
☐ Collate
☐ Bail Not
☐ Made
☐ Bail Status
☐ Changed
 (See Docket)

☐ 10% D
☐ Surety
☐ Collate
☐ Bail Not
☐ Made
☐ Bail Status
☐ Changed
 (See Docket)

☐ 10% D
☐ Surety
☐ Collate
☐ Bail Not
☐ Made
☐ Bail Status
☐ Changed
 (See Docket)

☐ 10% D
☐ Surety
☐ Collate
☐ Bail Not
☐ Made
☐ Bail Status
☐ Changed
 (See Docket)

☐ 10% D
☐ Surety
☐ Collate
☐ Bail Not
☐ Made
☐ Bail Status
☐ Changed
 (See Docket)

☐ 10% D
☐ Surety
☐ Collate
☐ Bail Not
☐ Made
☐ Bail Status
☐ Changed
 (See Docket)

☐ 10% D
☐ Surety
☐ Collate
☐ Bail Not
☐ Made
☐ Bail Status
☐ Changed
 (See Docket)

☐ 10% D
☐ Surety
☐ Collate
☐ Bail Not
☐ Made
☐ Bail Status
☐ Changed
 (See Docket)

☐ 10% D
☐ Surety
☐ Collate
☐ Bail Not
☐ Made
☐ Bail Status
☐ Changed
 (See Docket)

☐ 10% D
☐ Surety
☐ Collate
☐ Bail Not
☐ Made
☐ Bail Status
☐ Changed
 (See Docket)

☐ 10% D
☐ Surety
☐ Collate
☐ Bail Not
☐ Made
☐ Bail Status
☐ Changed
 (See Docket)

☐ 10% D
☐ Surety
☐ Collate
☐ Bail Not
☐ Made
☐ Bail Status
☐ Changed
 (See Docket)

☐ 10% D
☐ Surety
☐ Collate
☐ Bail Not
☐ Made
☐ Bail Status
☐ Changed
 (See Docket)

☐ 10% D
☐ Surety
☐ Collate
☐ Bail Not
☐ Made
☐ Bail Status
☐ Changed
 (See Docket)

☐ 10% D
☐ Surety
☐ Collate
☐ Bail Not
☐ Made
☐ Bail Status
☐ Changed
 (See Docket)

☐ 10% D
☐ Surety
☐ Collate
☐ Bail Not
☐ Made
☐ Bail Status
☐ Changed
 (See Docket)

☐ 10% D
☐ Surety
☐ Collate
☐ Bail Not
☐ Made
☐ Bail Status
☐ Changed
 (See Docket)

☐ 10% D
☐ Surety
☐ Collate
☐ Bail Not
☐ Made
☐ Bail Status
☐ Changed
 (See Docket)

☐ 10% D
☐ Surety
☐ Collate
☐ Bail Not
☐ Made
☐ Bail Status
☐ Changed
 (See Docket)

☐ 10% D
☐ Surety
☐ Collate
☐ Bail Not
☐ Made
☐ Bail Status
☐ Changed
 (See Docket)

☐ 10% D
☐ Surety
☐ Collate
☐ Bail Not
☐ Made
☐ Bail Status
☐ Changed
 (See Docket)

☐ 10% D
☐ Surety
☐ Collate
☐ Bail Not
☐ Made
☐ Bail Status
☐ Changed
 (See Docket)

☐ 10% D
☐ Surety
☐ Collate
☐ Bail Not
☐ Made
☐ Bail Status
☐ Changed
 (See Docket)

☐ 10% D
☐ Surety
☐ Collate
☐ Bail Not
☐ Made
☐ Bail Status
☐ Changed
 (See Docket)

☐ 10% D
☐ Surety
☐ Collate
☐ Bail Not
☐ Made
☐ Bail Status
☐ Changed
 (See Docket)

☐ 10% D
☐ Surety
☐ Collate
☐ Bail Not
☐ Made
☐ Bail Status
☐ Changed
 (See Docket)

☐ 10% D
☐ Surety
☐ Collate
☐ Bail Not
☐ Made
☐ Bail Status
☐ Changed
 (See Docket)

☐ 10% D
☐ Surety
☐ Collate
☐ Bail Not
☐ Made
☐ Bail Status
☐ Changed
 (See Docket)

☐ 10% D
☐ Surety
☐ Collate
☐ Bail Not
☐ Made
☐ Bail Status
☐ Changed
 (See Docket)

☐ 10% D
☐ Surety
☐ Collate
☐ Bail Not
☐ Made
☐ Bail Status
☐ Changed
 (See Docket)

☐ 10% D
☐ Surety
☐ Collate
☐ Bail Not
☐ Made
☐ Bail Status
☐ Changed
 (See Docket)

☐ 10% D
☐ Surety
☐ Collate
☐ Bail Not
☐ Made
☐ Bail Status
☐ Changed
 (See Docket)

☐ 10% D
☐ Surety
☐ Collate
☐ Bail Not
☐ Made
☐ Bail Status
☐ Changed
 (See Docket)

☐ 10% D
☐ Surety
☐ Collate
☐ Bail Not
☐ Made
☐ Bail Status
☐ Changed
 (See Docket)

☐ 10% D
☐ Surety
☐ Collate
☐ Bail Not
☐ Made
☐ Bail Status
☐ Changed
 (See Docket)

☐ 10% D
☐ Surety
☐ Collate
☐ Bail Not
☐ Made
☐ Bail Status
☐ Changed
 (See Docket)

☐ 10% D
☐ Surety
☐ Collate
☐ Bail Not
☐ Made
☐ Bail Status
☐ Changed
 (See Docket)

☐ 10% D
☐ Surety
☐ Collate
☐ Bail Not
☐ Made
☐ Bail Status
☐ Changed
 (See Docket)

☐ 10% D
☐ Surety
☐ Collate
☐ Bail Not
☐ Made
☐ Bail Status
☐ Changed
 (See Docket)

☐ 10% D
☐ Surety
☐ Collate
☐ Bail Not
☐ Made
☐ Bail Status
☐ Changed
 (See Docket)

☐ 10% D
☐ Surety
☐ Collate
☐ Bail Not
☐ Made
☐ Bail Status
☐ Changed
 (See Docket)

☐ 10% D
☐ Surety
☐ Collate
☐ Bail Not
☐ Made
☐ Bail Status
☐ Changed
 (See Docket)

☐ 10% D
☐ Surety
☐ Collate
☐ Bail Not
☐ Made
☐ Bail Status
☐ Changed
 (See Docket)

☐ 10% D
☐ Surety
☐ Collate
☐ Bail Not
☐ Made
☐ Bail Status
☐ Changed
 (See Docket)

☐ 10% D
☐ Surety
☐ Collate
☐ Bail Not
☐ Made
☐ Bail Status
☐ Changed
 (See Docket)

☐ 10% D
☐ Surety
☐ Collate
☐ Bail Not
☐ Made
☐ Bail Status
☐ Changed
 (See Docket)

☐ 10% D
☐ Surety
☐ Collate
☐ Bail Not
☐ Made
☐ Bail Status
☐ Changed
 (See Docket)

☐ 10% D
☐ Surety
☐ Collate
☐ Bail Not
☐ Made
☐ Bail Status
☐ Changed
 (See Docket)

☐ 10% D
☐ Surety
☐ Collate
☐ Bail Not
☐ Made
☐ Bail Status
☐ Changed
 (See Docket)

EYES

U. S. Attorney or Asst.

Cyril Hyman

Defense U. S. Attorney or Asst. Waiver Self-Defense Other

ARREST

INDICTMENT

ARRAIGNMENT

TRIAL

SENTENCE

U. S. Custody

Began on Above

Charges

High Risk

Defn. &

Date Design'd

Information

Waived

Superseding

Indict/Info

Prosecution Deferred

12-19-75

1st Plea

Final Plea

Trial Set For

3-22-76

Not Guilty

None

Guilty

Not Guilty

None

Guilty

Voir Dire

6/28/76

Trial Begun

6/30/76

Trial Ended

6/30/76

Trial Set For

3-22-76

Disposition

6/30/76

Convicted

Acquitted

Dismissed

Nolled/Discontinued

On All Ch

On Later

Offenses

WOP

Nolled/Discontinued

On All Ch

On Later

Offenses

WOP

Nolled/Discontinued

On All Ch

On Later

Offenses

WOP

Nolled/Discontinued

On All Ch

On Later

Offenses

WOP

Nolled/Discontinued

On All Ch

On Later

Offenses

WOP

Nolled/Discontinued

On All Ch

On Later

Offenses

WOP

Nolled/Discontinued

On All Ch

On Later

Offenses

WOP

Nolled/Discontinued

On All Ch

On Later

Offenses

WOP

Nolled/Discontinued

DATE	IV. PROCEEDINGS (continued)	V. EXCLUDABLE DELAY			
		(a)	(b)	(c)	(d)
4-8-76	Letter filed dated 4-5-76 received from Chambers from Copal Mintz, Esq. (retd to Chambers as directed)				
4-13-76	Govts Bill of Particulars filed				
4-20-76	Renewal of motion to dismiss the peition forwarded to Chambers as directed.				
4/21/76	Before DOOLING, J.- Case called-deft and counsel present- deft's motion to dismiss argued- decision reserved- deft's waives speedy trial rule- trial adjd to 6/28/76				
4-28-76	By DOOLING J - Memorandum and Order filed on motion for bill of particulars, etc. The charge of paragraph 3 will not be tried but is stricken as insufficient when read with the bill of particulars, (see Order)				
6-28-76	Memorandum filed in behalf of deft				
6-28-76	Before DOOLING, J. - Case called. Deft & counsel present. Deft renews motion to dismiss. Motion denied. Trial ordered and begun. The jury was selected and sworn in. Both sides open. Govt rests. Deft moves for a judgment of acquittal prusuant to rule 29(a) and renews motion to dismiss the petition as failing to charge an offense. Motions denied. Trial continued. to 6-29-76.				
6-30-76	Before DOOLING J - case called - deft & counsel present - trial resumed - defts move for judgment of acquittal - denied - Govts sums up - Defts summation - Govts rebuttal summation - Jury charged - jurors retire to deliberate - jury deliberations contd to June 30, 1976				
6-30-76	Before DOOLING, J. - Case called. Trial resumed. Jury start deliberations resumed. Deft & counsel present. The jury returned with a verdict of guilty as charged in counts 1 and 2. Jury polled. Jury discharged. Trial concluded. Deft moves for judgment of acquittal on each count not withstanding the verdict. Motion denied. Bail continued. Sentence adj'd without date.				
7-6-76	Notice of motion for judgment of acquittal filed.				
7-6-76	By DOOLING, J. - Order dtd 7-8-76 denying motions for judgment of acquittal filed on back of motion filed 7-6-76.				
8-27-76	Before DOOLING J - case called - deft is fined \$625 on each of counts 1 and 2 for a total fine of \$1,250 Execution of fine stayed pending appeal. Deft advised of right to appeal.				
8-27-76	Judgment & commitment filed				

BEST COPY AVAILABLE

Docket Entries - Joseph I. Ross

U.S. DISTRICT COURT - CRIMINAL DOCKET

Felony ☐ JUDGE/Assigned Trial
 Offense ☐ MAGISTRATE
 Minor ☐ District Office 2071
 Disp./Sentence 6712

U.S. vs. **75 CR 902-3**
JOSEPH I. ROSS - Vice President
and Treasurer of the corporation
 defendant

Case Filed
 Day Mo. Yr. 26 11 75
 Docket No. 75-902-3
 No. of 3
 Defendants 734973

ARGES
 U.S. CODE SECTION
 U.S. Attorney or Asst.

Order to show cause in criminal contempt
CLERK

MAG. CASE NO.
 BAIL & RELEASE
☐ Personal Rec
☐ Denied ☐ Unsecured Bo
 AMT ☐ Conditional Release
 Set (000) \$
☐ 10% Dep
☐ Surety B
☐ Collater
☐ Bail Not Made
☐ 3rd Part
☐ Bail Status Changed
☐ Custody
☐ PSA
 (See Docket)

EYS
Cyril Hyman

ARREST ☐ INDICTMENT ☐ ARRAIGNMENT ☐ TRIAL ☐ SENTENCE
 U.S. Custody or Began on Above Charges
 High Risk Defn. & Date Design'd
 Waived
 Superseding Indict/Info
 1st Plea 12/19/75
 Final Plea 3/2/76
 Not Guilty
 Nolo
 Guilty
 Not Guilty
 Nolo
 Guilty
 Trial Began 6/28/76
 Trial Ended 6/30/76
 Disposition
☐ Convicted ☐ On All Ch
☐ Acquitted ☐ On Lesser Offense(s)
☐ Dismissed ☐ WOP
☐ Nolle/Discontinued

Search Warrant	Issued	DATE	INITIAL/No.	INITIAL APPEARANCE	INITIAL/No.	OUTCOME
	Return			PRELIMINARY EXAMINATION OR REMOVAL HEARING	Date Scheduled Date Held	<input type="checkbox"/> Dismissed <input type="checkbox"/> Held for District GJ <input type="checkbox"/> Held to Answer to U. S. District Court
Summons	Issued			<input type="checkbox"/> Waived <input type="checkbox"/> Not Waived	<input type="checkbox"/> Intervening Indictment	<input type="checkbox"/> Exonerated <input type="checkbox"/> To Transf District
Arrest Warrant	Served			Tape No.	INITIAL/No.	AT: Magistrate's Initials
COMPLAINT						
OFFENSE (In Complaint)						

Show last names and suffix numbers of other defendants on same indictment/information		V. Excludable Delay		
DIAPYCE CORPORATION-1	JESSE ROSS-2	(a)	(b)	(c)
DATE	PROCEEDINGS			
11/26/75	By DOOLING, J. - Order to show cause dated 11/26/75 for criminal contempt of permanent injunction filed ret. 12/19/75 at 9330 A.M.			
12/8/75	Notice of motion for bill of particulars filed ret. 12/19/75			
12/8/75	Order to show cause ret'd and filed executed			12/8/75
12-19-75	Before DOOLING J - case called - deft & atty Copal Mintz present - deft JOSEPH I. ROSS arraigned and enters a plea of not guilty - Govt by consent to comply with motion for bill of particulars by 2-18-76; deft to file motion for dismissal by 3-1-76; trial scheduled for 3-22-76.			
2-26-76	Notice of Motion filed for Bill of Particulars, etc.			
3/3/76	Memorandum of law in opposition to dismiss filed			
3-4-76	Before DOOLING, J - Case called for hearing on motion to dismiss. Motion argued. Decision reserved.			
3-9-76	Supplemental Memorandum filed on behalf of motion to dismiss			
3-9-76	Memorandum to all counsel filed setting trial during week of 4-26-76			
3-12-76	Govts reply memorandum filed			
3-31-76	By DOOLING J - Memorandum and Order filed that defts motions are denied except as indicated on the record etc. Particulars are to be furnished within t. o weeks from date (see Memo for details)			

vi
Docket Entries - Joseph I. Ross

DATE	IV. PROCEEDINGS (continued)	V. EXCLUDABLE DELAY			
		(a)	(b)	(c)	(d)
4-8-76	Letter dated 4-5-76 filed received from counsel Copal Mintz (read to Chambers as directed)				
4-13-76	Govts Bill of Particulars filed				
4-20-76	Resubmitted Renewal of motion to dismiss the petition filed and forwarded to Chambers as directed.				
4/21/76	Before DOOLING, J. - Case called - deft and counsel present - motion to dismiss argued - decision reserved deft waives speedy trial rule - trial adj'd to 6/23/76				
4-28-76	By DOOLING J - Memorandum and Order filed on motion for Bill of Particulars - The charge of Paragraph 3 will not be tried but is stricken as insufficient when read with the bill of particulars, etc. (see order)				
6-25-76	Govts trial memorandum filed; Govts Requests for Jury charges filed				
6-28-76	Memorandum filed in behalf of deft.				
6-29-76	Before DOOLING, J. - Case called. Deft & counsel present. Deft renews motion to dismiss. Motion denied. Trial ordered and begun. The jury was selected and sworn in. Both sides open. Govt rests. Deft moves for a judgment of acquittal pursuant to rule 29(a) and renews motion to dismiss the petition as failing to charge an offense. Motions denied. Trial continued to 6-29-76.				
6-29-76	Before DOOLING J - case called - deft & counsel present - trial resumed - motion for judgment of acquittal is denied - jury deliberations contd to June 30, 1976				
6-30-76	Before DOOLING, J. - Case called. Trial resumed. Jury deliberations resumed. Deft & counsel present. The jury returned with a verdict of guilty as charged in count 1. Jury polled. Jury discharged. Trial concluded. Deft moves for judgment of acquittal on count 1 notwithstanding the verdict. Motion denied. Bail continued. Sentence adj'd without date.				
7-6-76	Notice of motion for judgment of acquittal filed.				
7-8-76	By DOOLING, J. - Order dtd 7-; 8-76 denying motions for judgment of acquittal filed on back of motion filed 7-6-76.				
8-25-76	Exceptions to the Probation Report on deft Jesse Ross filed.				
8-27-76	Before DOOLING J - case called - deft & counsel Copal Mintz present - deft is fined the sum of \$2,500 on count 2. Execution of fine stayed pending appeal. Deft advised of right to appeal.				
8-27-76	Judgment & commitment filed.				

BEST COPY AVAILABLE

ORDER TO SHOW CAUSE IN CRIMINAL
CONTEMPT.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

-----X

UNITED STATES OF AMERICA. : Criminal No.

Plaintiff : 75 CR 302

-against-

: ORDER TO SHOW CAUSE
IN CRIMINAL CONTEMPT

DIAPULSE CORPORATION OF :
AMERICA, also known as THE :
DIAPULSE MANUFACTURING :
CORPORATION OF AMERICA, a :
corporation, JESSE ROSS, :
President of the corporation, :
and JOSEPH I. ROSS, Vice- :
President and Treasurer of :
the corporation, :

Defendants. :

-----X

FILED
IN CLERK'S OFFICE
S. DISTRICT COURT E.D. N.Y.

NOV 26 1975

TIME A.M.
P.M.

Upon the Petition for Order to Show Cause in Criminal
Contempt filed in this case by the United States Attorney
for this District, it is this 26th day of November,
1975, by the United States District Court for the Eastern District
of New York,

ORDERED that the defendants, Diapulse Corporation of
America, also known as The Diapulse Manufacturing Corporation
of America, a corporation, Jesse Ross, President of the corpora-
tion, and Joseph I. Ross, Vice-President and Treasurer of the
corporation, be and hereby are required to appear before this
Court at the United States Courthouse at

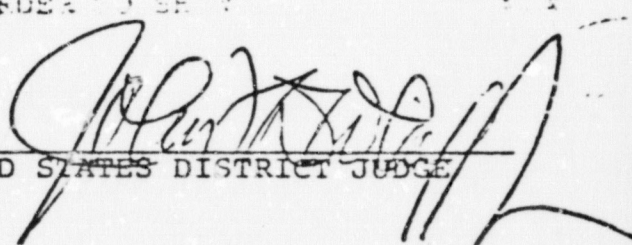
BEST COPY AVAILABLE

ORDER TO SHOW CAUSE IN CRIMINAL
CONTEMPT.

✓ on December 19, 1975, at 9³⁰ AM o'clock, or
as soon thereafter ^{for pleading in the petition and thereafter, a trial and date to be fixed} as Counsel can be heard, to show cause why
said Diapulse Corporation of America, also known as The Diapulse
Manufacturing Corporation of America, a corporation, Jesse Ross,
President of the corporation, and Joseph I. Ross, Vice-President
and Treasurer of the corporation, should not be punished for
criminal contempt of the Permanent Injunction issued by this
Court on July 18, 1974, which contempt arose out of disobedience

of said Injunction as charged in the aforesaid Petition, provided
that a copy of said Petition and of this Order be served on said
defendants forthwith but not later than on the 5th
day of December, 1975.

✓ Dated: November 26, 1975.
Brooklyn, New York

✓

UNITED STATES DISTRICT JUDGE

Petition for Order to Show Cause
in Criminal Contempt.

[Same Caption]

The United States of America, by its Attorney, David G. Trager, United States Attorney for the Eastern District of New York, files this petition and alleges:

1. On July 18, 1974, in Civil Action 68C391, entitled UNITED STATES OF AMERICA, Plaintiff, against DIAPULSE CORPORATION OF AMERICA, also known as THE DIAPULSE MANUFACTURING CORPORATION OF AMERICA, a corporation, Defendant, this Court issued and filed a Permanent Injunction enjoining Diapulse Corporation of America as follows:

[Pursuant to Section V of said decree]

"The defendant, Diapulse Corporation of America, a corporation shall:

"(B) Grant duly authorized officers and employees of the Food and Drug Administration free access to any of its offices, plants, factories, warehouses, storage facilities, or other establishments at reasonable times during regular working hours, within reasonable limits and in a reasonable manner to inspect such establishment and all pertinent equipment, finished and unfinished materials, containers, and labeling therein; and such inspection may include copying and photographing and shall also extend to all things therein (including records, files, papers, processes and facilities) bearing on whether any prohibited devices have been or are being manufactured, assembled, processed, packed, transported, or held in such place.

[Pursuant to Section II of said decree]

"For the purposes of this Injunction, the following terms shall be defined as follows:

"(E) The term 'prohibited device' as hereinafter used means and includes all and any of the following:

"(1) Any device known as Diapulse or by any other designation, including Models D-100, D-100J, D-101, D-102, or D-103, heretofore shipped, sold, leased, or introduced or delivered for introduction into interstate commerce;

Petition for Order to Show Cause in
Criminal Contempt.

"(2) Any device known as P/EmF or by any other designation, including any device defined in section II(E)(1) above, as modified to convert the said device to a P/EmF device;

"(3) Any device consisting of an electronic instrument incorporating an electromagnetic generator which produces or is adaptable to produce pulsed, short-wave, high frequency electromagnetic energy unless: (1) the peak power available at any setting of the said device does not exceed twice the average wattage at such setting; and (2) the said device is capable of raising the temperature of human tissue at a depth of 2 inches in the thigh muscle of living human subjects from a core body temperature of 98.6°F to 104°F in 20 minutes or less at a majority of its operational settings; and (3) the said device is capable of raising the temperature of human tissue at a depth of 2 inches in the thigh muscle of living human subjects to a range or temperatures of 104°F to 113°F at a series of readily selected settings of the said device." Exhibit A attached hereto.

2. Thereafter, since the issuance of said Permanent Injunction, and while said Permanent Injunction was in full force and effect, and with full knowledge of said Permanent Injunction and in defiance of its terms, Diapulse Corporation of America, also known as The Diapulse Manufacturing Corporation of America, a corporation, Jesse Ross, the president of said corporation, and Joseph I. Ross, the vice-president and treasurer of said corporation, did disobey and violate said order of permanent injunction as hereinafter shown.

3. On or about July 2, 1975, said Diapulse Corporation of America, and said Jesse Ross, the defendants herein, did at New Hyde Park, New York, disobey and violate section V(B) of said order of permanent injunction in that said defendants refused to grant Food and Drug Investigators Harry R. Baukney and Fred J. Massaro, duly authorized employees of the Food and Drug Administration, access to their establishment at 4 Nevada Drive, Lake Success, New Hyde Park, New York, at a reasonable

Petition for Order to Show Cause in
Criminal Contempt.

time during regular working hours, to inspect the establishment and all pertinent equipment, finished and unfinished materials, containers, and labeling therein and all things therein bearing on whether any prohibited devices as defined by section II(E) of said order of permanent injunction have been or are being manufactured, assembled, processed, packed, transported or held in the establishment.

4. On or about October 7, 1975, said Diapulse Corporation of America, and said Joseph I. Ross, the defendants herein, did at New Hyde Park, New York, disobey and violate section V(B) of said order of permanent injunction in that said defendants refused to grant Food and Drug Investigators Harry R. Baukney and Murray L. Kurzman, duly authorized employees of the Food and Drug Administration, access to their establishment at 4 Nevada Drive, Lake Success, New Hyde Park, New York, at a reasonable time during regular working hours, to inspect the establishment and all pertinent equipment, finished and unfinished materials, containers, and labeling therein and all things therein bearing on whether any prohibited devices as defined by section II(E) of said order of permanent injunction have been or are being manufactured, assembled, processed, packed, transported or held in the establishment.

5. On or about October 15, 1975, said Diapulse Corporation of America, said Jesse Ross, and said Joseph I. Ross, the defendants herein, did at New Hyde Park, New York, disobey and violate section V(B) of said order of permanent injunction in that said defendants refused to grant Food and Drug Investigators

Petition for Order to Show Cause
in Criminal Contempt.

Harry R. Baukney and Murray L. Kurzman, duly authorized employees of the Food and Drug Administration, access to their establishment at 4 Nevada Drive, Lake Success, New Hyde Park, New York, at a reasonable time during regular working hours, to inspect the establishment and all pertinent equipment, finished and unfinished materials, containers, and labeling therein and all things therein bearing on whether any prohibited devices as defined by section II(E) of said order of permanent injunction have been or are being manufactured, assembled, processed, packed, transported or held in the establishment.

6. That by reason of the aforesaid acts of refusing to grant duly authorized employees of the Food and Drug Administration access to their establishment at a reasonable time during regular working hours to inspect the establishment and all pertinent equipment, finished and unfinished materials, containers, and labeling therein and all things therein bearing on whether any prohibited devices have been or are being manufactured, assembled, processed, packed, transported or held in the establishment, Diapulse Corporation of America, also known as The Diapulse Manufacturing Corporation of America, a corporation, Jesse Ross, president of the corporation, and Joseph I. Ross, vice-president and treasurer of the corporation, are in criminal contempt of the aforesaid Permanent Injunction issued by this Court.

WHEREFORE, the Plaintiff prays that this Court issue an order herein requiring said Diapulse Corporation of America, also known as The Diapulse Manufacturing Corporation of America,

Petition for Order to Show Cause
in Criminal Contempt.

a corporation, Jesse Ross, president of the corporation, and Joseph I. Ross, vice-president and treasurer of the corporation, to show cause, if any they have, why they should not be adjudged in criminal contempt of this Honorable Court, at a time to be fixed in said Order, and that said Diapulse Corporation of America, also known as The Diapulse Manufacturing Corporation of America, a corporation, Jesse Ross, president of the corporation, and Joseph I. Ross, vice-president and treasurer of the corporation, after a hearing on the charges, be adjudged in criminal contempt of this Court and be punished as provided by law.

Dated: Brooklyn, New York
November 26, 1975

David G. Trager
United States Attorney, EDN
Attorney for Plaintiff
225 Cadman Plaza East
Brooklyn, New York 11201

By: Cyril Hyman
Cyril Hyman
Assistant U. S. Attorney

VERIFICATION

STATE OF NEW YORK)
 : SS.:
COUNTY OF KINGS)

CYRIL HYMAN, being duly sworn, deposes and says that he is an Assistant United States Attorney, in charge of the within action; that he has read the foregoing Petition and knows the contents thereof; that the same is true to his own knowledge, as such information was referred to this Office

Petition for Order to Show Cause
in Criminal Contempt.

by the Food and Drug Administration.

Cyril Hyman
CYRIL HYMAN
Assistant U. S. Attorney

Sworn to before me this
26th day of November, 1975

Stella B. Magier

STELLA B. MAGIER
Notary Public, State of New York
No. 24-4501884
Qualified in Kings County
Commission Expires March 30, 1977

[SAME CAPTION]

RESPONSE TO DEFENDANTS'
MOTION FOR BILL OF PARTICULARS

Defendants' motion for bill of particulars seeks in Paragraph 1(i) a specification of the statutes, rules, regulations and other provisions of law which are relied on or will be relied on to establish that the allegations in paragraphs 3, 4, and 5 of the Petition for an Order to Show Cause in Criminal Contempt constitute criminal contempt as charged in paragraph 6 of the petition. However, 18 U.S.C. 401 empowers the Court to punish for contempt any disobedience of a lawful decree of the Court. See this Court's opinion in United States v. Diapulse Corporation of America, 365 F.Supp. 935 (E.D. N.Y., 1973). Rule 42(b) of the Federal Rules of Criminal Procedure provides in pertinent part that a criminal contempt shall be prosecuted on notice and that the notice shall state the essential facts constituting the criminal contempt charged and describe it as such. Accordingly, it is the disobedience of the permanent injunction entered in this action which constitutes contempt of court, and reliance on statutes, rules, regulations, and other provisions of law is not required to establish the offense charged.

Paragraphs 1(ii), (iii), and (iv) asks (a) for a specification of the manner in which the investigators who attempted to conduct inspections authorized by the injunction were duly authorized employees of the Food and Drug Administration (FDA); (b) for a copy of such authorization if in writing, (c) whether the government claims that such authorization was exhibited or presented to the defendants, and whether it is claimed that at the time of the attempted inspections a written notice was presented to the defendants and, if so, for a copy of such notice.

The Federal Food, Drug, and Cosmetic Act, 21 U.S.C. 374(a), authorizes the Secretary of Health, Education, and Welfare to designate agents to make inspections and to conduct investigations. The Secre-

Response to Defendants' Motion For
Bill of Particulars.

tary's authority has been delegated to the Commissioner of Food and Drugs, 21 CFR 2.120, and redelegated, 21 CFR 2.121(p) (1) and (2), with respect to enforcement activities, FDA inspectors, officers, and employees who have been issued FDA official credentials. The official credentials issued to the Food and Drug Administration investigators named in paragraphs 3, 4, and 5 of the petition are described in 21 CFR 2.121(p) (3). Investigator Massaro carries FD Form 200 A, entitled "Identification Record" and FD Form 200 B entitled "Specification of General Authority". Investigators Baukney and Kurzman carry FD Form 200 A and FD Form 200 C entitled "Specification of General and Special Authority". The credentials were exhibited by the investigators at the time of the attempted inspections. Since the Food and Drug Administration is prohibited by 18 U.S.C. 701 from copying the investigators' credentials, defendants' counsel may contact Mr. Kenneth Klein of FDA's New York District Office, 850 Third Avenue, Brooklyn, New York 11232 (telephone 212-965-5041) to make an appointment for a time convenient to defendants' counsel and FDA to view, without copying, the credentials of investigators Baukney, Massaro, and Kurzman.

At the time of each attempted inspection described in paragraphs 3, 4, and 5 of the petition, a document entitled "Notice of Inspection" was presented. Since the original notice of inspection was issued at the time of each attempted inspection to a responsible representative of the corporate defendant, the defendants have been supplied with such written notice. In addition, a copy of each notice is attached hereto.

Paragraph 2 seeks an order permitting counsel for the defendants to inspect and copy or photograph the credentials of the FDA investigators which were exhibited to the defendants and the notices of inspection

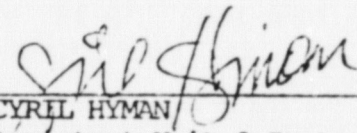
Response to Defendants' Motion For
Bill of Particulars.

which were presented to the defendants at the time of the attempted inspections. As indicated above, 18 U.S.C. 701 prohibits copying or photographing the credentials of FDA Investigators, the defendants were issued the original of the notices of inspection which were presented at the time of the attempted inspections, and copies of the notices of inspection are attached hereto. Accordingly, the order that the defendants seek should not be granted.

Dated: February 11, 1976

DAVID G. TRAGER
United States Attorney
Attorney for Plaintiff

By:


CYREL HYMAN
Assistant United States Attorney
Deputy Chief, Civil Division
225 Cadman Plaza East
Brooklyn, New York 11201
(Telephone 212-596-3562)

DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE
PUBLIC HEALTH SERVICE
FOOD AND DRUG ADMINISTRATION

1. DISTRICT ADDRESS

850 Third Avenue
Brooklyn, N.Y. 11232

2. NAME AND TITLE OF INDIVIDUAL

Mr. J. J. Con, Pres

DATE

July 2, 1975

4. FIRM NAME

Dispute Corporation of America

6. NUMBER AND STREET

4 Nevada Drive

7. CITY AND STATE

New Hyde Park, N.Y. 11040

8. ZIP CODE

—

Notice of inspection is hereby given pursuant to Section 703(a) of the Federal Food, Drug, and Cosmetic Act [21 U.S.C. 374(a)] and/or Part F or G, Title III of the Public Health Service Act [42 USC 262-264].²

9. SIGNATURE (Food and Drug Administration Employee(s))

Kenneth R. Brubaker / Fred J. Mancuso

10. TITLE (Food and Drug Administration Employee(s))

Ins. T. Gators

¹ Applicable portions of Section 704 of the Federal Food, Drug, and Cosmetic Act [21 U.S.C. 374] are quoted below:

Sec. 704. (a) For purposes of enforcement of this Act, officers or employees duly designated by the Secretary, upon presenting appropriate credentials and a written notice to the owner, operator, or agent in charge, are authorized (1) to enter, at reasonable times, any factory, warehouse, or establishment in which food, drugs, devices, or cosmetics are manufactured, processed, packed, or held, for introduction into interstate commerce or after such introduction, or to enter any vehicle being used to transport or hold such food, drugs, devices, or cosmetics in interstate commerce; and (2) to inspect, at reasonable times and within reasonable limits and in a reasonable manner, such factory, warehouse, establishment, or vehicle and all pertinent equipment, finished and unfinished materials, containers, and labeling therein. In the case of any factory, warehouse, establishment, or consulting laboratory in which prescription drugs are manufactured, processed, packed, or held, inspection shall extend to all things therein (including records, files, papers, processes, controls, and facilities) bearing on whether prescription drugs which are adulterated or misbranded within the meaning of this Act, or which may not be manufactured, introduced into interstate commerce, or sold, or offered for sale by reason of any provision of this Act, have been or are being manufactured, processed, packed, transported, or held in any such place, or otherwise bearing on violation of this Act. No inspection authorized for prescription drugs by the preceding sentence shall extend to (A) financial data, (B) sales data other than shipment data, (C) pricing data, (D) personnel data (other than data as to qualifications of technical and professional personnel performing functions subject to this Act), and (E) research data (other than data relating to new drugs and antibiotic drugs, subject to reporting and inspection under regulations lawfully issued pursuant to section 505 (i) or (j) or section 507 (c) or (g) of this Act, and data relating to other drugs, which in the case of a new drug would be subject to reporting or inspection under lawful regulations issued pursuant to section 505 (j) of this Act). A separate notice shall be given for each such inspection, but a notice shall not be required for each entry made during the period covered by the inspection. Each such inspection shall be commenced and completed with reasonable promptness.

or derivative, allergenic product or other product aforesaid for sale, barter, or exchange in the District of Columbia, or to be sent, carried, or brought from any State or possession into any other State or possession or into any foreign country, or from any foreign country into any State or possession."

Part F — ***** Control of Radiation.

Sec. 360 A(a) "If the Secretary finds for good cause that the methods, tests, or programs related to electronic product radiation safety in a particular factory, warehouse, or establishment in which electronic products are manufactured or held, may not be adequate or reliable, officers or employees duly designated by the Secretary, upon presenting appropriate credentials and a written notice to the owner, operator, or agent in charge, are thereafter authorized (1) to enter, at reasonable times any area in such factory, warehouse, or establishment in which the manufacturer's tests for testing programs required by section 358(h) are carried out, and (2) to inspect, at reasonable times and within reasonable limits and in a reasonable manner, the facilities and procedures within such area which are related to electronic product radiation safety. Each such inspection shall be commenced and completed with reasonable promptness. In addition to other grounds upon which good cause may be found for purposes of this subsection, good cause will be considered to exist in any case where the manufacturer has introduced into commerce any electronic product which does not comply with an applicable standard prescribed under this subpart and with respect to which no exemption from the notification requirements has been granted by the Secretary under section 359(a)(2) or 359(c)."

Part G — Quarantine and Inspection.

Sec. 361(a) "The Surgeon General, with the approval of the Secretary is authorized to make and enforce such regulations as in his judgement are necessary to prevent the introduction, transmission, or spread of communicable diseases from foreign countries into the States or possessions, or from one State or possession into any other State or possession. For purposes of carrying out and enforcing such regulations, the Surgeon General may provide for such inspection, fumigation, disinfection, sanitation, pest extermination, destruction of animals or articles found to be so infected or contaminated as to be sources of dangerous infection to human beings, and other measures, as in his judgement may be necessary."

² Applicable sections of Parts F and G of Title III Public Health Service Act [42 USC 262 — 264] are quoted below:

Part F — Licensing — Biological Products and Clinical Laboratories and *****

Sec. 351(c) "Any officer, agent, or employee of the Department of Health, Education, and Welfare, authorized by the Secretary for the purpose, may during all reasonable hours enter and inspect any establishment for the propagation or manufacture and preparation of any virus, serum, toxin, antitoxin, vaccine, blood, blood component

DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE
PUBLIC HEALTH SERVICE
FOOD AND DRUG ADMINISTRATION

1. DISTRICT ADDRESS

850 Third Avenue
Brooklyn, N.Y.

2. NAME AND TITLE OF INDIVIDUAL

M. Joseph D. Ross, Vice Pres. Treas.

DATE

10-7-75

4. FIRM NAME

Diapulse Corporation of America

TO
S. HOUR

10¹⁵

a.m.

p.m.

6. NUMBER AND STREET

4 Nevada Drive

7. CITY AND STATE

Lake Success, N.Y. (New Hyde Park P.O.)

8. ZIP CODE

11040

- Notice of Inspection is hereby given pursuant to Section 704(a) of the Federal Food, Drug, and Cosmetic Act [21 U.S.C. 374 (a)] and/or Part F or G, Title III of the Public Health Service Act [42 USC 262-264].²

9. SIGNATURE (Food and Drug Administration Employee(s))

Kary P. Pauliney / Margaret Kuzma

10. TITLE (Food and Drug Administration Employee(s))

Investigators

¹ Applicable portions of Section 704 of the Federal Food, Drug, and Cosmetic Act [21 U.S.C. 374] are quoted below:

Sec. 704. (a) For purposes of enforcement of this Act, officers or employees duly designated by the Secretary, upon presenting appropriate credentials and a written notice to the owner, operator, or agent in charge, are authorized (1) to enter, at reasonable times, any factory, warehouse, or establishment in which food, drugs, devices, or cosmetics are manufactured, processed, packed, or held, for introduction into interstate commerce or after such introduction, or to enter any vehicle being used to transport or hold such food, drugs, devices, or cosmetics in interstate commerce; and (2) to inspect, at reasonable times and within reasonable limits and in a reasonable manner, such factory, warehouse, establishment, or vehicle and all pertinent equipment, finished and unfinished materials, containers, and labeling therein. In the case of any factory, warehouse, establishment, or consulting laboratory in which prescription drugs are manufactured, processed, packed, or held, inspection shall extend to all things therein (including records, files, papers, processes, controls, and facilities) bearing on whether prescription drugs which are adulterated or misbranded within the meaning of this Act, or which may not be manufactured, introduced into interstate commerce, or sold, or offered for sale by reason of any provision of this Act, have been or are being manufactured, processed, packed, transported, or held in any such place, or otherwise bearing on violation of this Act. No inspection authorized for prescription drugs by the preceding sentence shall extend to (A) financial data, (B) sales data other than shipment data, (C) pricing data, (D) personnel data other than data as to qualifications of technical and professional personnel performing functions subject to this Act, and (E) research data (other than data relating to new drugs and antibiotic drugs, subject to reporting and inspection under regulations lawfully issued pursuant to section 505 (i) or (j) or section 507 (d) or (g) of this Act, and data relating to other drugs, which in the case of a new drug would be subject to reporting or inspection under lawful regulations issued pursuant to section 505 (j) of this Act). A separate notice shall be given for each such inspection, but a notice shall not be required for each entry made during the period covered by the inspection. Each such inspection shall be commenced and completed with reasonable promptness.

² Applicable sections of Parts F and G of Title III Public Health Service Act [42 USC 262 - 264] are quoted below:

Part F - Licensing - Biological Products and Clinical Laboratories and*****

Sec. 350. (a) "Any officer, agent, or employee of the Department of Health, Education, and Welfare, authorized by the Secretary for the purpose, may during all reasonable hours enter and inspect any establishment for the propagation or manufacture and preparation

of any virus, serum, toxin, antitoxin, vaccine, blood, blood component or derivative, allergenic product or other product aforesaid for sale, barter, or exchange in the District of Columbia, or to be sent, carried, or brought from any State or possession into any other State or possession or into any foreign country, or from any foreign country into any State or possession."

Part F - ***** Control of Radiation.

Sec. 350 A(a) "If the Secretary finds for good cause that the methods, tests, or programs related to electronic product radiation safety in a particular factory, warehouse, or establishment in which electronic products are manufactured or held, may not be adequate or reliable, officers or employees duly designated by the Secretary, upon presenting appropriate credentials and a written notice to the owner, operator, or agent in charge, are thereafter authorized (1) to enter, at reasonable times any area in such factory, warehouse, or establishment in which the manufacturer's tests for testing programs required by section 358(h) are carried out, and (2) to inspect, at reasonable times and within reasonable limits and in a reasonable manner, the facilities and procedures within such area which are related to electronic product radiation safety. Each such inspection shall be commenced and completed with reasonable promptness. In addition to other grounds upon which good cause may be found for purposes of this subsection, good cause will be considered to exist in any case where the manufacturer has introduced into commerce any electronic product which does not comply with an applicable standard prescribed under this subpart and with respect to which no exemption from the notification requirements has been granted by the Secretary under section 359(a)(2) or 359(e)."

(b) "Every manufacturer of electronic products shall establish and maintain such records (including testing records), make such reports, and provide such information, as the Secretary may reasonably require to enable him to determine whether such manufacturer has acted or is acting in compliance with this subpart and standards prescribed pursuant to this subpart and shall, upon request of an officer or employee duly designated by the Secretary, permit such officer or employee to inspect appropriate books, papers, records, and documents relevant to determining whether such manufacturer has acted or is acting in compliance with standards prescribed pursuant to section 359(a)."

(f) "The Secretary may by regulation (1) require dealers and distributors of electronic products, to which there are applicable standards prescribed under this subpart and the retail prices of which is not less than \$50, to furnish manufacturers of such products such information as may be necessary to identify and locate, for purposes of section 359, the first purchasers of such products

DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE PUBLIC HEALTH SERVICE FOOD AND DRUG ADMINISTRATION		1. DISTRICT ADDRESS 850 Third Avenue Brooklyn, N.Y. 11232	
2. NAME AND TITLE OF INDIVIDUAL Mr. Jose M. M. Cross, Pres.		3. DATE 10-15-75	
4. FIRM NAME Disipulse Corporation of America		5. HOUR 10:30	
6. NUMBER AND STREET 4 Nevada Drive		6. P.M.	
7. CITY AND STATE Lake Success, N.Y. (New York City, P.O.)		8. ZIP CODE 11040	

Notice of Inspection is hereby given pursuant to Section 704(a) of the Federal Food, Drug, and Cosmetic Act [21 U.S.C. 374 (a)] and/or Part F or G, Title III of the Public Health Service Act [42 USC 262-264].²

9. SIGNATURE (Food and Drug Administration Employee(s)) Harry A. Kuehner / Murray L. Kuzman	10. TITLE (Food and Drug Administration Employee(s)) Investigators
--	---

¹ Applicable portions of Section 704 of the Federal Food, Drug, and Cosmetic Act [21 U.S.C. 374] are quoted below:

Sec. 704. (a) For purposes of enforcement of this Act, officers or employees duly designated by the Secretary, upon presenting appropriate credentials and a written notice to the owner, operator, or agent in charge, are authorized (1) to enter, at reasonable times, any factory, warehouse, or establishment in which food, drugs, devices or cosmetics are manufactured, processed, packed, or held, for introduction into interstate commerce or after such introduction, or to enter any vehicle being used to transport or hold such food, drugs, devices, or cosmetics in interstate commerce, and (2) to inspect, at reasonable times and within reasonable limits and in a reasonable manner, such factory, warehouse, establishment, or vehicle and all pertinent equipment, finished and unfinished materials, containers, and labeling therein. In the case of any factory, warehouse, establishment, or consulting laboratory in which prescription drugs are manufactured, processed, packed, or held, inspection shall extend to all things therein (including records, files, papers, processes, controls, and facilities) bearing on whether prescription drugs which are adulterated or misbranded within the meaning of this Act, or which may not be manufactured, introduced into interstate commerce, or sold, or offered for sale by reason of any provision of this Act, have been or are being manufactured, processed, packed, transported, or held in any such place, or otherwise bearing on violation of this Act. No inspection authorized for prescription drugs by the preceding sentence shall extend to (A) financial data, (B) sales data other than shipment data, (C) pricing data, (D) personnel data (other than data as to qualifications of technical and professional personnel performing functions subject to this Act), and (E) research data (other than data relating to new drugs and antibiotic drugs, subject to reporting and inspection under regulations lawfully issued pursuant to section 505 (i) or (j) or section 507 (d) or (g) of this Act, and data relating to other drugs, which in the case of a new drug would be subject to reporting or inspection under lawful regulations issued pursuant to section 505 (j) of this Act). A separate notice shall be given for each such inspection, but a notice shall not be required for each entry made during the period covered by the inspection. Each such inspection shall be commenced and completed with reasonable promptness.

² Applicable sections of Parts F and G of Title III Public Health Service Act [42 USC 262 - 264] are quoted below:

Part F - Licensing - Biological Products and Clinical Laboratories and *****

Sec. 351(c) "Any officer, agent, or employee of the Department of Health, Education, and Welfare, authorized by the Secretary for the purpose, may during all reasonable hours enter and inspect any establishment for the propagation or manufacture and preparation

of any virus, serum, toxin, antitoxin, vaccine, blood, blood component or derivative, allergenic product or other product aforesaid for sale, barter, or exchange in the District of Columbia, or to be sent, carried, or brought from any State or possession into any other State or possession or into any foreign country, or from any foreign country into any State or possession."

Part F - ***** Control of Radiation.

Sec. 350 (A)(a) "If the Secretary finds for good cause that the methods, tests, or programs related to electronic product radiation safety in a particular factory, warehouse, or establishment in which electronic products are manufactured or held, may not be adequate or reliable, officers or employees duly designated by the Secretary, upon presenting appropriate credentials and a written notice to the owner, operator, or agent in charge, are thereafter authorized (1) to enter, at reasonable times any area in such factory, warehouse, or establishment in which the manufacturer's tests for testing programs required by section 358(h) are carried out, and (2) to inspect, at reasonable times and within reasonable limits and in a reasonable manner, the facilities and procedures within such area which are related to electronic product radiation safety. Each such inspection shall be commenced and completed with reasonable promptness. In addition to other grounds upon which good cause may be found for purposes of this subsection, good cause will be considered to exist in any case where the manufacturer has introduced into commerce any electronic product which does not comply with an applicable standard prescribed under this subpart and with respect to which no exemption from the notification requirements has been granted by the Secretary under section 359(j)(2) or 359(e)."

(b) "Every manufacturer of electronic products shall establish and maintain such records (including testing records), make such reports, and provide such information, as the Secretary may reasonably require to enable him to determine whether such manufacturer has acted or is acting in compliance with this subpart and standards prescribed pursuant to this subpart and shall, upon request of an officer or employee duly designated by the Secretary, permit such officer or employee to inspect appropriate books, papers, records, and documents relevant to determining whether such manufacturer has acted or is acting in compliance with standards prescribed pursuant to section 359(A)."

(1) "The Secretary may by regulation (1) require dealers and distributors of electronic products, to which there are applicable standards prescribed under this subpart and the retail prices of which is not less than \$50, to furnish manufacturers of such products such information as may be necessary to identify and locate, for purposes of section 359, the first purchasers of such products

BEST COPY AVAILABLE

Motion for Dismissal of Plaintiff's Petition
Dated and Verified November 26, 1975.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

-----X

UNITED STATES OF AMERICA,

Plaintiff, Criminal No. 75 CR 902

-against-

DIAPULSE CORPORATION OF AMERICA,
also known as THE DIAPULSE MANUFACTURING CORPORATION OF AMERICA, a corporation, JESSE ROSS, President of the corporation and JOSEPH I. ROSS, Vice-President and Treasurer of the corporation,

MOTION FOR DISMISSAL
OF THE PLAINTIFF'S
PETITION IN THE ABOVE
ENTITLED PROCEEDING,
DATED AND VERIFIED
NOVEMBER 26, 1975.

Defendants,

-----X

The defendants herein move the Court to dismiss the petition in the above entitled proceeding (dated and verified November 26, 1975) on each of the following grounds:

1. The failure and refusal of the plaintiff to serve and file a bill of particulars fully complying with the defendants' notice therefor, dated December 5, 1975, and consented to in open court and as directed by the Court on December 19, 1975, in that in the bill of particulars served and filed by the the plaintiff, failed and refused to set forth a true copy of the authorizations which are claimed to have been exhibited to the defendants on the occasions alleged in the petition.

2. The failure and refusal of the plaintiff -- in disre-

Motion for Dismissal of Plaintiff's Petition
Dated and Verified November 26, 1975.

gard and violation of paragraph 2 of the above referred to notice, consent and direction -- to permit the attorney for defendants to copy the "credentials" therein referred to.

3. The petition, as limited and amplified by the plaintiff's bill of particulars, fails to set forth facts sufficient to constitute a criminal contempt of court, by reason of each of the following:

(i) Since the plaintiff disclaims reliance on any statutes, rules, regulations and provisions of law other than 18 U.S.C. 401, this proceeding is without basis because 18 U.S.C. 402 excludes from aforementioned Section 401 "contempts committed in disobedience of any lawful writ, process, order, rule, decree or command entered in any suit or action brought or prosecuted in the name, or on behalf of the United States".

(ii) Despite the plaintiff's disclaimer above noted, plaintiff's bill of particulars relies upon designations allegedly made under 21 CFR 2.120, 2.121(p)(1) and (2), 2.121(p)(3) and "FD Forms" 200A, 200B and 200C; and those provisions do not establish that Harry R. Baukney and Murray L. Kurzman, were "guly authorized" to make the

Motion for Dismissal of Plaintiff's Petition
Dated and Verified November 26, 1975.

demands, inspections, etc., alleged in the
petition; indeed, they establish the contrary.

(iii) It is clear from the notices alleged and
incorporated in the plaintiff's bill of particulars
that the petition fails to set forth facts suf-
ficient to constitute a violation of the pleaded
Permanent Injunction.

A supporting memorandum is being served herewith, and
will be filed herewith.

Dated, February 23 , 1976.

COPAL MINTZ,
Attorney for Defendants.

TO: DAVID G. TRAGER, ESQ.
United States Attorney,
Eastern District of New York,
Attorney for Plaintiff,
225 Cadman Plaza East,
Brooklyn, New York.

S I R :

NOTICE is hereby given that, at the direction of Hon. John
F Dooling, Jr., U.S.D.J., the foregoing motion will be heard by
his Honor, at his courtroom on the 6th floor of the United States
Courthouse at 225 Cadman Plaza East, Brooklyn, New York, on the 4th

Motion for Dismissal of Plaintiff's Petition
Dated and Verified November 26, 1975.

day of March, 1976 at 4:30 P.M. or as soon thereafter as counsel
will be heard.

Dated, February 23 , 1976.

COPAL MINTZ,
Attorney for Defendants,
Office & P.O. Address,
150 Broadway,
New York, N.Y. 10038
Tel.# 212-227-7070

Memorandum and Order

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

-----X

UNITED STATES OF AMERICA,

Plaintiff,

-against-

DIAPULSE CORPORATION OF AMERICA,
also known as THE DIAPULSE
MANUFACTURING CORPORATION OF
AMERICA, a corporation, JESSE
ROSS, President of the Corporation,
and JOSEPH I. ROSS, Vice-President
and Treasurer of the Corporation,

Defendants.

-----X

Appearances:

COPAL MINTZ, Esq. for defendants

CYRIL HYMAN, Esq. (DAVID G. TRAGER, Esq., United
States Attorney, of Counsel) for the Government

DOOLING, D.J.

The Government seeks to punish defendants for contemptuous disobedience of the injunction of July 18, 1974. It is alleged that defendants refused to grant Food and Drug Administration personnel access to the Diapulse premises to determine whether or not the injunction was being obeyed. Such access was allegedly refused on July 2, October 7 and October 15, 1975.

Memorandum and Order

Defendant moves inter alia to dismiss on the ground that the petition and bill of particulars fail to set forth facts sufficient to make out a contempt in that (i) the third paragraph of 18 U.S.C. 402 excludes the disobedience of an injunction from the class of contempts punishable under Section 401(3) where the injunction inhibits what is also a crime and was entered in a suit presented by the United States; (ii) the persons seeking to enforce the injunctive right to inspect were not properly authorized; (iii) the precondition to inspection under 21 U.S.C. 374(a), the existence of devices held for shipment in interstate commerce, was not present; and (iv) the FDA employees who sought access to the plant under the injunction, carrying FD Forms 200A, 200B and 200C, were not authorized to conduct inspections under 21 U.S.C. 374(a).

1. Section 374(a) is not involved. If employees duly designated by the Secretary present appropriate credentials and a written notice to the owner, they are authorized to enter plants where devices are held for introduction into commerce or after such introduction and to conduct the statutory inspection of the premises. Refusal to permit entry or inspection as authorized by Section 374(a) is a prohibited

Memorandum and Order

act (21 U.S.C. 331(f)), and is a misdemeanor, or, in some circumstances a felony (21 U.S.C. 333(a)(b)). It is not a contempt of the injunction of July 17, 18, 1974, entered in 68 C 391. Nor is a refusal to grant access and the right to inspect pursuant to Part V(B) of the injunction of July 17, 18, 1974, a prohibited act under 21 U.S.C. 331(f) nor a misdemeanor under Section 333(a). The two rights of access and inspection are distinct and refusal to permit exercise of each of the rights has distinct and different consequences.

The bill of particulars furnished by the Government correctly points out in its first paragraph that what is involved is a violation of the injunction, and not of any statute, rule or regulation.

2. It is not necessary to repeat the reasons why it has been concluded that the alleged contempt, if it occurred, can be prosecuted under 18 U.S.C. 401(3). See United States v. Diapulse Corp. of America, 1973, 365 F.Supp. 935.

3. For what it is worth in this context, it may be said that the delegation of authority from the Secretary to the Assistant Secretary has been traced out satisfactorily in the Government's Memorandum in Opposition. See 33 F.R. 4894-5, 5426, 9909-9911, 35 F.R. 606-607; 38 F.R. 18261-2.

Memorandum and Order

And see 37 F.R. 24377-8. More practically, 21 C.F.R. §§ 2.120(a)(1), 2.121(a), (p)(1)(i), (ii), (2)(i)(ii), 3(i), (ii), (iii), (iv) remove any doubt about delegation, redelegation and employee authorization. It is, as defendant's Supplemental Memorandum notes, the Federal Register and not the Code of Federal Regulations which is the authoritative publication.

The language of Section 2.121(p)(1)(i), reflected in FD Forms 200a and 200b self-evidently covers Section 374(a) inspections where they are involved. So too Section 2.121(p)(2)(i), (ii) plainly covers all that is in Section 2.121(p)(1)(i) and, in addition, the special authority granted under Section 2.121(p)(2)(ii) to the extent at least of the matter repeated in the particular FD Form 200c carried by the inspector.

4. The petition does not specify the manner in which the inspectors demonstrated their authority to the defendants. Defendants demanded particulars of the manner in which the inspectors were authorized, copies of their authorizations, a statement about whether or not the authorizations were exhibited to defendants and a statement as to whether or not

Memorandum and Order

a notice was presented. The bill of particulars responds by showing that the investigators presented a notice and credentials appropriate to a Section 374(a) inspection.

The bill of particulars does not state that the investigators were armed with certified copies of the injunction and a direction from the head of the FDA compliance unit (probably the Associate Commissioner for Compliance) to conduct the inspection authorized by the injunction. Identification in the form of FD Forms 200a and 200b would more than satisfy the requirements of appropriate caution on defendants' part. No more than this was needed, and nothing less than a clear-cut manifestation to the defendants that the inspection was under the decree would serve the needs of the occasion. The Section 374(a) notification was a confusing and wholly inappropriate intrusion if an inspection under the decree was intended. It is unnecessary to consider whether there must, in effect, be a common understanding that devices destined for interstate commerce are on the premises before a Section 374(a) inspection can be made. Inspection under the decree is, in significant part, addressed to determining whether any prohibited devices are being manufactured, transported, or held in the premises.

Memorandum and Order

If, as the Bill of Particulars suggests, the Government and did not unequivocally seek to inspect under the decree, /if it failed to make that manifest to the defendants, it would appear that the contempts charged in the petition can not be proved.

It is, accordingly,

ORDERED that defendants' motions are denied except that plaintiff is directed to serve a further bill of particulars directed to the questions of whether or not the investigators were authorized to inspect under the decree and what, if any, material they proffered to defendants to establish their authority and to show that they had been directed to conduct an inspection under the decree and bounded by its terms. The particulars are to be furnished within two weeks from date.

Brooklyn, New York

March 31, 1976.


U. S. D. J.

Bill of Particulars Pursuant to
Order of Court.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

-----X

United States of America,	:	
	:	
Plaintiff,	:	CRIMINAL NO. 75-CR-902
	:	
v.	:	
	:	
DIAPULSE CORPORATION OF	:	
AMERICA, also known as THE	:	
DIAPULSE MANUFACTURING CORP-	:	
ORATION OF AMERICA, a corp-	:	
oration, JESSE ROSS, president:	:	
of the corporation, and	:	
JOSEPH I. ROSS, vice-	:	
president and treasurer of	:	
the corporation,	:	
	:	
Defendants.	:	
	:	

-----X

BILL OF PARTICULARS PUR-
SUANT TO ORDER OF COURT

The Court's memorandum and order dated March 31, 1976 directs the Government to serve a further Bill of Particulars directed to the questions of whether or not the investigators who attempted to conduct the inspections as alleged in the petition for order to show cause in criminal contempt were authorized to inspect under the decree of permanent injunction and what, if any, material the inspectors proffered to the defendants to establish their authority and to show that they had been directed to conduct an inspection under the decree. This Bill of Particulars is in response to that order.

As set out in the Petition for Order to Show Cause in Criminal Contempt, Section V(B) of the permanent injunction provides that the Diapulse Corporation of America shall:

Bill of Particulars Pursuant to
Order of Court.

(b) Grant duly authorized officers and employees of the Food and Drug Administration free access to any of its offices, plants, factories, warehouses, storage facilities, or other establishments at reasonable times during regular working hours, within reasonable limits and in a reasonable manner to inspect such establishment and all pertinent equipment, finished and unfinished materials, containers, and labeling therein; and such inspection may include copying and photographing and shall also extend to all things therein (including records, files, paper, processes and facilities) bearing on whether any prohibited devices have been or are being manufactured, assembled, processed, packed, transported, or held in such place.

Under the terms of this provision, the only person who may conduct the inspection provided for are "officers and employees of the Food and Drug Administration." Since the injunction itself nowhere provides any specific procedure for other authorization of Food and Drug Administration officers and employees to conduct the inspection provided for by the permanent injunction entered by this Court and properly so, the FDA employees who were duly authorized to conduct the inspection provided for by the injunction were those persons specifically designated by the Food and Drug Administration to conduct inspections and investigations pursuant to its authority under 21 U.S.C. 372 and 374. Not all Agency employees are so authorized, however, only a small proportion of the Agency's employees have been authorized to conduct inspections and investigations.

The utilization by the Agency of its existing procedures for the authorization of employees to conduct investigations and inspections is clearly in accord with the holding

Bill of Particulars Pursuant to
Order of Court.

by the Court of Appeals for this Circuit that Section V(B) of the injunction does not exceed the inspectional authority provided under 21 U.S.C. 374(a). United States v. Diapulse Corporation of America, 514 F.2d 1097 (C.A. 2, 1975).

Under these procedures, the Commissioner of Food and Drugs has delegated his authority regarding inspectional enforcement activities to certain officers and employees of the Food and Drug Administration who are specially qualified and to whom have been issued Food and Drug Administration official credentials consisting of FD forms 200 A, B, and C. The authority of Food and Drug Administration employees to whom these official credentials have been issued are set out at 21 CFR 2.121 (p). As provided by 21 CFR 2.121(p)(1)(i) and (2)(i), such employees are authorized, in pertinent part,:

to conduct examinations, inspections,
and investigations; to collect and
obtain samples; to have access to
and to copy and verify records; and
to supervise compliance operations,
for the enforcement of the Federal
Food, Drug, and Cosmetic Act, ...

It is only those employees who have been specifically designated who are authorized to conduct inspections for the Food and Drug Administration.

The credentials carried by the investigators who attempted to conduct the inspections alleged in the Petition for Order to Show Cause in Criminal Contempt were exhibited by them at the time of the attempted inspections. Investigator Massaro carries FD form 200 A entitled "Identification Record" and FD form 200 B entitled "Specification of General Authority". Investigators

Bill of Particulars Pursuant to
Order of Court.

Baukney and Kurzman carry FD form 200 A and FD form 200 C entitled "Specification of General and Special Authority".

The credentials issued to these investigators as indicated above establish that they are one of the employees who have been delegated the authority to conduct inspections for the Food and Drug Administration as prescribed by 21 CFR 2.121 (p). Pursuant to this authority, the investigators were "duly authorized" to conduct the inspection authorized by Section V(B) of the permanent injunction, since this is clearly intended to be an FDA inspection for the enforcement of the law. Assignment from a superior directing that a particular inspection pursuant to the injunction be conducted provides no additional authority for the investigators to conduct the inspection. Such assignments are utilized by the Food and Drug Administration in order to efficiently manage the deployment of its personnel and such assignments have no bearing on the validity of inspections conducted by authorized personnel. While such assignments were issued with respect to the attempted inspections involved in this proceeding [copies of which assignments are attached hereto], these assignments were not exhibited to the defendants at the time of the attempted inspections, since there is no specification in the injunction that this is required.

At each of the attempted inspections, a notice of inspection was issued to the defendants [copies attached to First Bill of Particulars]. Such notices were issued because Food and Drug Administration investigators are required to

Bill of Particulars Pursuant to
Order of Court.

issue such a notice each time they conduct an inspection as here, for the enforcement of the Federal Food, Drug, and Cosmetic Act. The notice informs the person inspected of the date and time of inspection, and identity of the investigators and the FDA District Office.

At each of the attempted inspections, the defendants were notified that the investigators were present to conduct an inspection of the premises and of records. Since the investigators at each inspection exhibited the credentials indicated above at the time of each attempted inspection, the defendants were required by Section V(B) of the injunction to allow the inspection of the premises and records to be conducted. The investigators did not exhibit a certified copy of the injunction to the defendants at the time of the attempted inspections, since the injunction does not provide that the Diapulse Corporation of America shall grant free access to duly authorized employees of the Food and Drug Administration upon their exhibiting to the defendant a certified copy of the injunction. Similarly, a copy of the investigators' internal Agency assignment was not exhibited to the defendants at the attempted inspections, since the injunction does not provide that free access shall be granted to duly authorized employees of the Food and Drug Administration upon their presentation of a copy of such an internal assignment to the investigator from his superior.

The defendants at each attempted inspection involved in this proceeding were orally advised by the investigators

Bill of Particulars Pursuant to
Order of Court.

that the authority for the attempted inspection was the permanent injunction. At the attempted inspection of July 7, 1975, the defendant, Jesse Ross, was advised that it was the investigators' purpose to inspect the premises and to review certain records. On Mr. Ross's objection to inspection, he was advised that the terms of the injunction authorize the investigators to enter and inspect the premises and to review records. Mr. Ross replied that his attorneys had advised him that the wording of the injunction means that an inspection must be permitted only if the firm ships Diapulse units in interstate commerce. At the inspection of October 7, 1975, the investigators advised the defendant, Joseph I. Ross, that it was the investigators' purpose to inspect the physical premises and records pertinent to the production of Diapulse and P/EmF devices. Upon Mr. Ross's refusal to allow the inspection, investigator Kurzman read to Mr. Ross pertinent portions of Section V(B) of the injunction authorizing inspection of the firm's premises and records. At the inspection of October 15, 1975, the defendant, Jesse Ross, was advised that it was the investigators' purpose to conduct an inspection of the premises and to review records. Upon Mr. Ross' objection to the inspection, he was advised by the investigators that his actions were considered to be in violation of the terms of the injunction.

As indicated above, it is evident that it was the purpose of the Food and Drug Administration investigators to conduct an inspection as authorized by Section V(B) of the

Bill of Particulars Pursuant to
Order of Court.

permanent injunction. It is also clear on the basis of the facts stated herein that the defendants were advised and were well aware that the attempted inspections involved in this proceeding were to be conducted pursuant to the authority of the permanent injunction. And it is equally clear that the defendants understood full well the investigators' authority and intentions but preferred to read the injunction authority as being restricted to situations in which the defendants have agreed that prohibited devices are on the premises.

Dated: Brooklyn, New York
April 13, 1976

DAVID G. TRAGER
United States Attorney
Attorney for Plaintiff

By:



CYRIL HYMAN
Assistant U.S. Attorney
Deputy Chief, Civil Division
225 Cadman Plaza East
Brooklyn, New York 11201
(Telephone: 212-596-3562)

Bill of Particulars Pursuant to
Order of Court.

FWA/RMDDP

P

unclas

RMDDP

6/18/75

XX"

Michael J. Matlock, HFK-100

(301) 443-6686

NEW YORK DISTRICT
ATTN: G. J. GERSTENBERG

FROM: DIVISION OF COMPLIANCE, HFK-100
RMDDP

SUBJECT: REQUEST FOR INSPECTION TO DETERMINE
COMPLIANCE WITH THE PERMANENT INJUNCTION #552
DIAPULSE CORPORATION OF AMERICA

RMDDP requests an in-depth inspection of the Diapulse Corporation
of America, and all of its related business addresses as submitted by
Diapulse.

Street Address of office, plant, and factory -- 4

Nevada Drive, Lake Success, New Hyde Park, New
York 11040

Warehouse - Compass Van & Storage Corp., 237 Main
Street, Hempstead, New York 11551

Storage Facilities - Murphy's Moving & Storage Corp.,
200 Middle Neck Road, Great Neck, New York 11023

Other Establishments - Berry Electronics, 218 North
Wellwood Avenue, Lindenhurst, New York 11757

Bill of Particulars Pursuant to
Order of Court.

Paragraph IV(D) (2) of the above Injunction requires an accounting of all P/Emf devices and kits, including those not returned. So far as we are aware, no such accounting has been provided. All time frames specified in the permanent injunction have now been exceeded and therefore failure to comply puts them in violation of the injunction. If we can establish that they are in violation of the permanent injunction, then we will be prepared to go before the court and seek redress.

EMDP requests the investigators assigned to make the inspection to familiarize themselves with the case and feel free to contact EMDP, Michael Hatlock, 301-443-6636 or Dan Beardsley 301-443-4032 if any problem is encountered during the inspection.

The permanent injunction signed by Judge Pooling on July 18, 1974 remains in full effect following affirmation by the Court of appeals.

Pursuant to section V(B) of the Injunction, FDA is authorized free access to inspect the defendants offices, plants, factories, warehouses, storage facilities or other establishments and to inspect all pertinent equipment, finished and unfinished materials, containers and labeling therein including copying and photographing extending to all things including records, files, papers, processes and facilities, bearing on whether any prohibited devices have been, or are being manufactured, assembled, processed, packed or transported.

In addition to the Notice and Copy of the Injunction which Diapulse was obligated to send out, Section IV(D) (1) of the permanent injunction required the Diapulse Corporation of America, by October 18, 1974, to cause the prohibited devices of Section II(E) (2) (P/Emf's and Modification

Bill of Particulars Pursuant to
Order of Court.

Kits) and all labeling accompanying these prohibited devices to be returned to their headquarters or other suitable facilities approved by the Food and Drug Administration. To date the Diapulse Corporation of America has not requested FDA approval for any other suitable facilities therefore we assume all P/EnF Modification Kits and labeling should have been sent to the firms headquarters at New Hyde Park, N.Y.

We believe that the District should take all steps necessary to enforce paragraph 5(b) of the Injunction to obtain total accountability on shipments and returns under this recall. We are providing copies of all materials received by HEDDP on this recall.

The 180 days required under the Permanent Injunction for the firm to have made a final decision as to whether they were going to destroy or salvage the returned devices has now passed and the thoroughness of your inspection will have a definite impact on whether further regulatory action is indicated in this matter.

In response to NYK-DO R&R 2/26/75 we are not assigning a recall number to the actions under taken by the firm. Mr. Patterson (CCF-1) agrees that references to a recall be deleted.

Michael J. Matlock

Bill of Particulars Pursuant to
Order of Court.

FEA/B-BDP

P

Unclas

HWFD

10/3/75

XX

Michael J. Matlock/HFK-100

(44) 34932

A. F. 7.5.75 FILE

NEW YORK DISTRICT
ATTN: G. J. GERSHBERG

FROM: DIVISION OF COMPLIANCE, HFK-100
B-BDP

SUBJECT: REQUEST FOR A FOLLOW-UP INSPECTION TO
DETERMINE COMPLIANCE WITH PERMANENT
INJUNCTION #552 - DIAPULSE CORPORATION
OF AMERICA

Following a ACC/CCF/NYK-DO/B-BDP conference 10/2/75 it was decided
FDA should again attempt a F/U inspection of the Diapulse Corporation
of America to determine if Diapulse will permit an inspection of
their premises.

We have had refusals on January 2, 1975 and June 2, 1975. NYK-DO has
a draft SQR. B-BDP desires an updated inspection attempt to be
conducted by October 6, if possible.

If the inspection request is granted the inspection should be carried
out in accordance with B-BDP/NYK-DO TLR of 6/13/75.

If the inspection request is refused, the investigators should return
to the office, after discussing fully with the agent in charge the
authority provided both by the terms of the Injunction and the Federal
Food, Drug, and Cosmetic Act and the possible consequences of a

Bill of Particulars Pursuant to
Order of Court.

refusal. EDDP will entertain a District report for institution of the criminal contempt proceedings for violation of the permanent injunction. ACC has requested that the SQR which was sent to you by EDDP be amended and submitted to General Counsel within one week of the refusal. Therefore, we ask that you submit your amended recommendation to us with sufficient lead time to enable us to meet ACC's request.

1. It was emphasized at the meeting that experienced investigators be used and they should be well acquainted with the Injunction. They should also be acquainted with differences between the P/DAF devices, P/DAF modification kits and Diapulse devices and the requirements for each under the injunction.

2. We are interested in determining the location of as many Diapulse devices as possible. Since the injunction provides authority to review records we believe the investigators should use all the diplomacy and tact possible to try to obtain this information.

3. If the person or agent in charge refuses inspection on the basis that the firm is not engaged in interstate commerce, the investigators should inform him that the injunction as well as the Federal Food, Drug, and Cosmetic Act authorizes the FDA to inspect to determine the status of the firm. Moreover, even though the Court has allowed for the exportation of these devices, export shipments are regarded as interstate commerce and thus the firm is an FDA obligation.

Bill of Particulars Pursuant to
Order of Court.

In the event of a refusal the substance of the conversation should be promptly reduced to writing and made a part of the record. Should the inspection be permitted, contact Mr. Dan Beardsley, 301-443-4032 before termination of the inspection to determine whether any additional information is needed.

Bill of Particulars Pursuant to
Order of Court.

Dan R. Beardsley/HFK-100

FW/EDDP

P

UNCLAS

HCTD

10/14/75

x

Dan R. Beardsley/HFK-100

301-443-4032

NEW YORK DISTRICT OFFICE
ATTN: K. M. KLEIN

FROM: Division of Compliance, HFK-100
EDDP

SUBJECT: Refusal of Inspection

We are in receipt of your TWX 10/9/75 regarding the firm's Vice President and Treasurer denying the investigators entry to the premises in order to carry out their inspection. In the absence of the President of the Corporation, Jesse Ross, we concur with your recommendation that an inspection be attempted upon his return.

Dan R. Beardsley

Renewal of Motion to Dismiss the
Petition.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

-----X

UNITED STATES OF AMERICA,

Plaintiff, 75 CR 902

-against-

RENEWAL OF MOTION TO
DISMISS THE PETITION.

DIAPULSE CORPORATION OF AMERICA,
also known as THE DIAPULSE MANU-
FACTURING CORPORATION OF AMERICA,
a corporation, JESSE ROSS, Pres-
ident of the Corporation, and
JOSEPH I. ROSS, Vice-President
and Treasurer of the Corporation,

Defendants.

-----X

On the plaintiff's further bill of particulars served on
or about April 14, 1976 pursuant to the court's memorandum and order
dated March 31, 1976, and on the papers heretofore submitted in this
proceeding, defendants, on the basis of that memorandum and order of
the court, respectfully renew their motion that the petition be dis-
missed.

In its memorandum and order, this court ruled, inter-alia:

"Refusal to permit entry or inspection as author-
ized by Section 374(a)...is not a contempt of the
injunction of July 17, 18, 1974, entered in 68 C 391.
Nor is a refusal to grant access and the right to
inspect pursuant to Part V(B) of the injunction
of July 17, 18, 1974, a prohibited act under
21 U.S.C. 331(f) nor a misdemeanor under Section
333(a). The two rights of access and inspection
are distinct and refusal to permit exercise of
each of the rights has distinct and different
consequences.

Renewal of Motion to Dismiss the
Petition.

...nothing less than a clear cut manifestation to the defendants that the inspection was under the decree would serve the needs of the occasion. The Section 374(a) notification was a confusing and wholly inappropriate intrusion if an inspection under the decree was intended... [Emphasis added by me]

If, as the Bill of Particulars suggests, the Government did not unequivocally seek to inspect under the decree, and if it failed to make that manifest to the defendants, it would appear that the contempts charged in the petition cannot be proved."

The further bill of particulars does not dispel the confusion; it reveals the pervasiveness of it. It persists in invoking and in relying upon F.D.A.'s "authority under 21 U.S.C. 372 and 374" and the Agency's "utilization...of its existing procedures for the authorization of employees to conduct investigations and inspections...clearly in accord with the holding by the Court of Appeals... that Section V(B) of the injunction does not exceed the inspectional authority provided in 21 U.S.C. 374(a)...As provided by 21 CFR 2.12(p) (i) and (2)(1), such employees are authorized in pertinent part,:

to conduct examinations, inspections, and investigations; to collect and obtain samples; to have access to and to copy and verify records; and to supervise compliance operations, for the enforcement of the Federal Food, Drug, and Cosmetic Act,... [Emphasis added by me]

The further bill of particulars confirms that the only "credentials carried by the investigators" and that "were exhibited

Renewal of Motion to Dismiss the
Petition.

by them at the time of the attempted inspections" were FD forms 200A, 200B and 200C and that the inspectors issued and delivered to the defendants printed notices bearing their signatures informing the defendants that such notices were being "given pursuant to Section 704a of the Federal Food, Drug and Cosmetic Act (21 U.S.C. 374(a))..."

The only new element brought in by the further bill of particulars is the claim (at p. 5) that the inspectors "orally advised" the defendants "that the authority for the attempted inspection was the permanent injunction" and that on October 7, 1975 (Investigator Kurzman read to Mr. Ross pertinent portions of Section V(B) of the injunction."

The alleged oral references to the injunction were directly contrary to the formal printed notices which stated that the desired inspections were pursuant to 21 U.S.C. 374(a). That section set out verbatim specifically limited the right of inspection to "any factory, warehouse or establishment in which food, drugs, devices or cosmetics are manufactured, processed, packed, or held for introduction into interstate commerce..." [Emphasis added]

The further bill of particulars explains (at p.4) that the 374(a) "notices were issued because Food and Drug Administration investigators are required to issue a notice each time they conduct an inspection as here, for the enforcement of the Federal Food, Drug and Cosmetic Act."

Thus, it appears that the inspections were demanded under

Renewal of Motion to Dismiss the
Petition.

Section 374(a) for the enforcement of the Federal Food, Drug and
Cosmetic Act and not under the provisions of the injunction to
verify compliance therewith.

It should be further noted that:

FD Form 200A merely identified the inspectors as such;

FD Form 200B certified that its bearer was

"a duly accredited agent...authorized to administer oaths and affirmations and to act for the Commissioner in the performance of the duties provided in the laws and Department Regulations administered by the Food and Drug Administration";

and FD Form 200C identified the bearer to be

"a duly accredited, scientifically trained agent specifically authorized to have access to and copy or verify any records and reports required under Section 505(i) or (j) or 507(d) or (g) of the Federal Food, Drug and Cosmetic Act as amended and is authorized to administer oaths and affirmations and to act for the Commissioner in the performance of the duties provided in the laws and Department Regulations administered by the Food and Drug Administration."

Referred to Sections 505(i) or (j) or 507(d) or (g) have no application whatsoever to devices.

Which should the defendants have accepted: (i) the printed and signed notices and the contents of the official credentials, or (ii) the alleged oral assertions in contradiction of the limitations contained in the notices and credentials?

This court has already answered, as quoted above:

"...Nothing less than a clear cut manifestation to the defendants that the inspection was under the

BEST COPY AVAILABLE

Renewal of Motion to Dismiss the
Petition.

decree would serve the needs of the occasion. The Section 374(a) notification was a confusing and wholly inappropriate intrusion if an inspection under the decree was intended... If...the Government did not unequivocally seek to inspect under the decree, and if it failed to make that manifest to the defendants, it would appear that the contempt charges in the petition cannot be proved."

This is a criminal proceeding in which willful disobedience must be established beyond a reasonable doubt. Here, it is clear that the F.D.A. officials themselves were confused and now are blowing hot and cold: the Government invokes Section 374(a), F.D. Forms for investigation under 374(a) and notices for inspection under 374(a), all of which the Government argues were necessary to a proper search under the injunction, and withheld from the defendants the now alleged instructions to the investigators and maintains that those instructions were unnecessary, "provides no additional authority for the investigators to conduct the inspection...have no bearing on the validity of the inspections conducted by the authorized personnel... [and properly] were not exhibited to the defendants at the time of the attempted inspections..."

The Government is trying to convict on the basis of withheld [and presumably secret] instructions and delivered documents which called for inspections under 374(a) which made no reference to the injunction and quoted 374(a) exclusively.

The Government's position is not helped by its inexact char-

BEST COPY AVAILABLE

Renewal of Motion to Dismiss the
Petition.

acterization of the following paragraph in the opinion of the Court
of Appeals:

"Finally, we reject the suggestion that the injunction exceeds the inspectional authority provided by the Act, by extending to all things '(including records, files, papers, processes and facilities) bearing on whether any prohibited devices have been or are being manufacturer, assembled, processed, packed, transported, or held in such place.' Aside from the propriety of the provision in light of the history of non-compliance with the 1972 decree, the specification of such authority with respect to prescription drugs, added by the 1962 amendments, Drug Amendments of 1962, Pub.L. No. 87-781, Title II, §201 (a) (Oct. 10, 1962), 76 Stat. 792, was not intended 'to detract from, or imply the absence of, existing authority as to other drugs or articles subject to the act.' 1962 U.S.Code, Cong. & Admin. News 2889."

Nothing in that holding applies to the questions (1) was inspection here sought under a section of the Food and Drug Act or under the injunction, (2) did the credentials which were exhibited to defendants and the notices which were delivered to defendants make it unequivocally clear to defendants that, in contradiction of their contents, inspection was sought under the injunction and that the inspectors were duly authorized to proceed under the terms of the injunction as distinguished from the provisions of the quoted statute.

If Section 374(a) was violated, this court has pointed out that redress must be sought under 21 U.S.C. 331 (f) or 333(a)(b) and such a violation "is not a contempt of the injunction of July 17, 18, 1974 entered in 68 C 391."

Renewal of Motion to Dismiss the
Petition.

It is respectfully submitted that the petition herein,
as amplified by the bills of particulars and credential forms, fail
to make out a prima facie case and the petition should be dismissed.

Respectfully submitted,

Copal Mintz
COPAL MINTZ,
Attorney for Defendants.

Dated: April 20, 1976.

Memorandum and Order
Denying the Motion.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

-----X

UNITED STATES OF AMERICA,

- against -

75 CR 902

DIAPULSE CORPORATION OF AMERICA,
also known as THE DIAPULSE
MANUFACTURING CORPORATION OF
AMERICA, a corporation, JESSE
ROSS, President of the Corporation,
and JOSEPH I. ROSS, Vice-President
and Treasurer of the Corporation,

MEMORANDUM and
ORDER

Defendants.

-----X

In light of the further bill of particulars filed April 13, 1976, it may be that at the trial the Government will be able to prove the charges of paragraphs 4 and 5 of the Petition. No way of proving the alleged contempt of July 2, 1975, appears from the petition, paragraph 3, and the bill of particulars filed April 13, 1976. Accordingly, only the charges with respect to the October 7 and October 15, 1975, inspections (paragraphs 4 and 5) may be tried. The charge of paragraph 3 will not be tried but is stricken as insufficient when read with the bill of particulars.

It is so ORDERED.

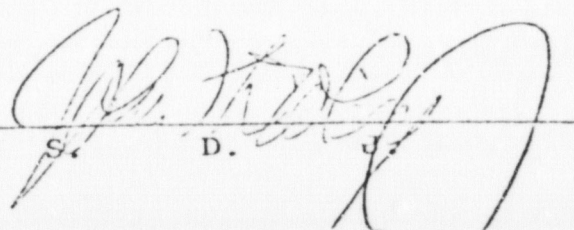
Brooklyn, New York,

April 28, 1976.

U.

S.

D.



Jury's Verdict June 30, 1976

[260]

(Whereupon, at 3:00 p.m. the following occurred in open court:)

THE COURT: We have a message, members of the jury, that you have reached a verdict.

THE CLERK: Mr. Foreman, ladies and gentlemen of the jury, as to the first charge, October 7, 1975, how do you find the defendant Joseph R. Ross, guilty or not guilty?

THE FOREMAN: Guilty.

THE COURT: As to the second charge October 16, 1975, how do you find the defendant Jesse Ross, guilty or not guilty?

[261]

THE FOREMAN: Guilty.

THE CLERK: As to the second charge, October 15, 1975 how do you find the defendant Joseph I. Ross, guilty or not guilty?

THE FOREMAN: Guilty.

THE CLERK: You say you find the defendant guilty as to the first charge and find the defendant Jesse Ross and Joseph I. Ross guilty of the second charge, and so say you all?

THE JURY: Yes.

THE COURT: You wish the jury polled?

MR. MINTZ: Yes, your Honor.

Jury's Verdict June 30, 1976

THE CLERK: You have heard your verdict as the Court has received it finding the defendant Joseph I. Ross guilty of the first charge and finding the defendant Jesse Ross and Joseph I. Ross guilty of the second charge.

Mr. Foreman, is that your verdict?

THE FOREMAN: Yes, sir.

THE CLERK: Juror No. 2, is that your verdict?

JUROR NO. 2: Yes.

THE CLERK: Juror No. 3 is that your verdict?

JUROR NO. 3: Yes.

THE CLERK: Juror No. 4, is that your verdict? [262]

JUROR NO. 4: Yes.

THE CLERK: Juror No. 5, is that your verdict?

JUROR NO. 5: Yes.

THE CLERK: Juror No. 6, is that your verdict?

JUROR NO. 6: Yes.

THE CLERK: Juror No. 7, is that your verdict?

JUROR NO. 7: Yes.

THE CLERK: Juror No. 8, is that your verdict?

JUROR NO. 8: Yes.

THE CLERK: Juror No. 9, is that your verdict?

JUROR NO. 9: Yes.

THE CLERK: Juror No. 10, is that your verdict?

JUROR NO.10. Yes.

Jury's Verdict June 30, 1976

THE CLERK: Juror No. 11, is that your verdict?

JUROR NO. 11: Yes.

THE CLERK: Juror No. 12, is that your verdict?

JUROR NO. 12: Yes.

THE CLERK: And so say you all.

Post Trial Motion Under Rule 29

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

-----X

UNITED STATES OF AMERICA,

Plaintiff, 75 CR 902

-against-

MOTION UNDER RULE 29
OF RULES OF CRIMINAL
PROCEDURE.

DIAPULSE CORPORATION OF AMERICA,
also known as THE DIAPULSE
MANUFACTURING CORPORATION OF
AMERICA, a corporation, JESSE
ROSS, President of the Corporation,
and JOSEPH I. ROSS, Vice-President
and Treasurer of the Corporation,

Defendants.

-----X

Defendants herein, through their attorney, pursuant to
leave granted at the conclusion of the trial on June 30, 1976, here-
by restate, amplify and renew their motions for the entry of judg-
ment of acquittal and that the verdict be set aside, on each of the
following grounds:

1. The petition, as amplified by the Government's bills of
particulars, failed to set forth, as to each of the counts, facts
sufficient to constitute the charged contempt.

2. The petition, as amplified by the Government's bills of
particulars, failed to set forth facts or documents or references
thereto, sufficient to establish that the investigators named in the
petition had been and were duly authorized to exercise the authority

Post Trial Motion

provided in Section V (B) of the Permanent Injunction set forth in the petition.

3. The petition, as amplified by the Government's bill of particulars, failed to set forth facts or documents or references thereto, sufficient to establish that the investigators named in the petition had been or were duly authorized by the Federal Food and Drug Administration through the Secretary of the Department of Health Education and Welfare (or a duly designated delegatee) to exercise the authority provided under Section V (B) of the Permanent Injunction.

4. The petition, as amplified by the Government's bills of particulars, failed to set forth that the investigators named in the petition, or any of them, made any demand in writing for access, etc., under the terms of the Permanent Injunction and acknowledged affirmatively that no such writing was delivered or exhibited.

5. The petition, as amplified by the Government's bills of particulars, affirmatively set forth that no written demand was made etc., for access, under the terms of the Permanent Injunction.

6. The petition, as amplified by the Government's bills of particulars, shows that the credentials which were exhibited and the written notices which were delivered were expressly limited to a demand for access, etc., under the provisions of the Federal Food Drug and Cosmetic Act.

7. The petition, as amplified by the Government's bills of particulars, fails to show that the investigators, or any of them,

Post Trial Motion

made a clear cut, unequivocal and unconfused demand for access, etc., under the Permanent Injunction.

8. The evidence, as to the October 7, 1975 count, failed to establish the charged contempt.

9. The evidence, as to the October 13, 1975 count, failed to establish the charged contempt.

10. The evidence, as to the October 7, 1975 count, was insufficient to warrant a finding of guilt beyond a reasonable doubt.

11. The evidence, as to the October 13, 1975 count, was insufficient to warrant a finding of guilt beyond a reasonable doubt.

12. The evidence failed to establish that the referred to investigators, or any of them, had been or were duly authorized to exercise the authority provided in Section V (B) of the Permanent Injunction.

13. The evidence failed to establish that the referred to investigators, or any of them, had been or were duly authorized by the Federal Food and Drug Administration through the Secretary of the Department of Health Education and Welfare (or a duly designated delegatee) to exercise the authority provided in Section V (B) of the Permanent Injunction.

14. The evidence failed to show that the investigators, or any of them, made a demand in writing for access, etc., under the terms of the Permanent Injunction.

Post Trial Motion

15. The evidence established that the investigators, by the identifications which they exhibited to the defendants and the writings, which they told the defendants they were required to deliver and did deliver, limited the demand for access exclusively under the provisions of the Federal Food, Drug and Cosmetics Act.

16. The evidence failed to establish a proper or due demand, on October 7, 1975, for access, etc., under the terms of the Permanent Injunction.

17. The evidence affirmatively showed that none of the investigators, on October 7, 1975, made a demand in writing for access, etc., under the terms of the Permanent Injunction.

18. The evidence failed to establish that on October 7, 1975, the investigators, or any of them, made a clear cut, unequivocal and unconfused demand for access, etc., under the Permanent Injunction.

19. The evidence failed to establish a proper or due demand, on October 15, 1975, for access, etc., under the terms of the Permanent Injunction.

20. The evidence affirmatively showed that none of the investigators, on October 15, 1975, made a demand in writing for access, etc., under the terms of the Permanent Injunction.

21. The evidence failed to establish that on October 15, 1975, the investigators, or any of them, made a clear cut, unequiv-

ocal and unconfused demand for access, etc., under the Permanent Injunction.

22. The evidence, as to the October 7, 1975 count, failed to establish a refusal.

23. The evidence, as to the October 7, 1975 count, failed to establish a willful and contumacious refusal by defendant Joseph Ross, with knowledge that thereby he was disobeying the Permanent Injunction.

24. The evidence, as to the October 13, 1975 count, failed to establish a refusal.

25. The evidence, as to the October 13, 1975 count, failed to establish a willful and contumacious refusal by defendant Joseph Ross, with knowledge that thereby he was disobeying the Permanent Injunction.

26. The evidence, as to the October 15, 1975 count, failed to establish a willful and contumacious refusal by defendant Jesse Ross, with knowledge that thereby he was disobeying the Permanent Injunction.

27. The evidence failed to establish beyond a reasonable doubt, as to the respective defendants, each of the following:

- (a) That the investigators, or any of them, had been or were duly authorized to exercise the authority provided in Section V (B) of the Permanent Injunction;

Post Trial Motion

(b) That the investigators, or any of them, had been or were duly authorized by the Federal Food and Drug Administration, through the Secretary of the Department of Health Education and Welfare (or a duly designated delegatee) to exercise the authority provided under Section V (B) of the Permanent Injunction;

(c) That the investigators, or any of them, had presented to the respective defendants on the respective days evidence of authority to demand access, etc., under the Permanent Injunction;

(d) That the investigators, or any of them, had made a due demand -- clear and unconfused -- for access, etc., under the Permanent Injunction.

(e) That the respective defendants, on the respective days, wrongfully refused access, etc., in violation of the Permanent Injunction;

(f) That the respective defendants, on the respective days, willfully and contumaciously refused access, etc., with knowledge that thereby they were intentionally disobeying the Permanent Injunction;

and also

-56-

Post Trial Motion

28. On each and every of the Court's rulings and dispositions in the pre-trial proceedings in the course of the trial and at the conclusion thereof, to which the defendants' attorney objected and/or took exception.

Dated: July 6, 1976.

COPAL MINTZ,
Attorney for Defendants,
Office & P.O. Address,
150 Broadway,
New York, N.Y. 10038
Tel. (212) 227-7070

TO:

HON. JOHN F. DOOLING, JR.,
United States District Judge,
(Court Room 8).

DAVID G. TRAGER, ESQ.,
United States Attorney for the
Eastern District of New York,
Attorney for the Plaintiff,
225 Cadman Plaza East,
Brooklyn, New York 11201

Subject to the approval of the Court and unless otherwise designated by the Court, the foregoing motion is submitted without oral argument or further submission. Cyril Hyman, Esq., Assistant United States Attorney, on behalf of the Government, consents thereto and has informed the undersigned that he does not deem it necessary to submit opposing papers unless requested by the Court. If the Court desires a hearing, the Court is respectfully requested to fix the time therefor.

BEST COPY AVAILABLE

COPAL MINTZ,
Attorney for Defendants.

Order Denying Post Trial Motion

July 8, 1976

No further hearing appears to be necessary; the points have been fully argued and passed on at earlier stages of this case and during the trial. No reason appears for now taking a different view of the matter. It is

ORDERED that the within motions as made and renewed are in all respects denied.

John F. Dooling, Jr.
U.S.D.J.

Exceptions To The Probation Report
On Jesse Ross

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

-----X

UNITED STATES OF AMERICA,

Plaintiff,

75 CR 902

-against-

EXCEPTIONS TO THE
PROBATION REPORT ON
JESSE ROSS.

DIAPULSE CORPORATION OF AMERICA,
also known as THE DIAPULSE
MANUFACTURING CORPORATION OF
AMERICA, a corporation, JESSE
ROSS, President of the Corpora-
tion, and JOSEPH I. ROSS, Vice-
President and Treasurer of the
Corporation,

Defendants.

-----X

Defendant JESSE ROSS, by his attorney COPAL MINTZ, respect-
fully takes the following exceptions to the Probation Report on him,
dated August 11, 1976:

1. Introductory Observation.

Mr. Jesse Ross (hereinafter referred to as Mr. Ross) was
interviewed by Mr. Frederick Schramm on June 30, 1976, directly after
the jury's verdict. He had made arrangements to leave that evening
or early the following morning for Canada on a mission (infra pages 9-10
which he deemed extremely important. He was terribly shaken by the
verdict and at the same time anxious not to be delayed in proceeding
to Canada. Mr. Schramm very cooperatively stated that he was pre-

Exceptions To The Probation Report

pared to interview both Mr. Ross and Mrs. Ross immediately so as not to interfere with his Canadian engagement; that was appreciated. But proceeding in the state that he was in, it may well be, that in the stress, strain and anxiety of the occasion, some confusion resulted as to precisely what was asked and what was said.

2. Cooperation.

It was about 6 P.M. when the interviews of Mr. and Mrs. Ross were concluded. He was not asked to be fingerprinted or photographed; he was asked to produce the tax returns for the last three years and his financial statement; Mr. Ross undertook to have them delivered the following day. He also told Mr. Schramm that while he was in Canada he would, on call, return, if his presence were necessary. Mr. Schramm replied such a necessity was not anticipated. The requested copies of tax returns and financial statement were delivered the following day.

Early the following morning Mr. Schramm called Mr. Ross on the telephone; he said that he had omitted to have him fingerprinted and photographed and asked him to return for that. Mr. Ross replied that he was ready to leave for Canada but expected to be back for a day or about 10 to 14 days and asked if that would be time enough. Mr. Schramm responded in the affirmative. Mr. Ross was in New York on July 14 and was prepared to arrange to submit for fingerprinting and photographing. But he was told by Mr. Joseph Ross that Mr. Schramm

Exceptions To The Probation Report

was on vacation and that Mr. Schramm had told him that he had already completed his reports. Under those circumstances Mr. Ross returned to Canada. Nothing further was heard in regard to fingerprinting or photographing.

After reading, on August 19, the comment in the probation report "that the defendant has thus far not reported to the U.S. Marshal for fingerprinting", Mr. Ross presented himself the following day to the U.S. Marshal's office to be fingerprinted and photographed. He was told they had no order to take his fingerprints or photograph and ^{they} refused to do either. Efforts by Mr. Ross since then to communicate with Mr. Schramm have resulted in calls back and forth without contact because the called party was not in.

3. Education.

Mr. Ross reiterates that he graduated from Erasmus High School and then proceeded to and attended Butler University, New York University and City College of New York, in that sequence. (Attendance at other educational institutions are mentioned below). He maintains that he was never discharged from the high school; toward the end he, for economic reasons, transferred himself to the night school and graduated with a diploma. For supporting documentation, he, several days ago, went to the high school premises; he found the school closed except for a caretaker and was told that records were not available until after school reopens on September 13. If given the time, Mr. Ross feels certain that he will produce school

Exceptions To The Probation Report

records which will establish his graduation.

Mr. Ross' name, until about 1940, was Rosenbloom; he was at Erasmus under that name. It is possible that there was also a Jesse Ross at Erasmus during the same period. Did the Probation Department apply for information on Jesse Ross or on Jesse Rosenbloom?

To get records from Butler University will also take time and the same applies to the records of New York University.

However, attached hereto is a photo-copy of a transcript from the City College of New York. Attention is respectfully called to the following appearing therein:

"Basis of admission: A.B. 2.41 Butler U.;
M.E. 6.42 N.Y.U."

Surely that was not entered without adequate documentation establishing that Mr. Ross had attended at Butler University and New York University in 1941-1942.

His civilian education was interrupted by military training and service which are detailed in subsequent pages.

Five years after his military training and service (referred to below), Mr. Ross, as appears from the above mentioned photo-copy of a City College of New York transcript, entered that institution in 1949 and continued there until sometime in August 1950. The transcript specifies the subjects that Mr. Ross pursued and the grades he earned during the terms ending "2.50 Grad." "6.50 Grad." and "8.50" indicating attendance from September or October 1949 through

Exceptions To The Probation Report

August 1950.

In connection with those studies, Mr. Ross did indeed write a thesis on the "Establishment of a Typewriter Business" which, in 1950, he submitted to the City College of New York, School of Business Administration, "in partial fulfillment of the requirements for the degree of Master of Business Administration" and which was granted to him in September 1950. In support thereof, a copy of that thesis will be exhibited to the Court, duly authenticated and bearing the stamp "Library C.C.N.Y." where the original was deposited and filed.

4. Military Training and Service.

In 1942 through part of January, 1943, Mr. Ross was an Inspector of Ordnance Materiel in the New York Ordnance District of the War Department. Photo-copies of two letters of commendation are annexed. While he was employed by the War Department, Mr. Ross enlisted in the Aviation Cadets Corps. of the U.S. Army Air Force on November 24, 1942 and reported for active duty in the United States Air Force on January 28, 1943. Between March 10, 1943 and July 31, 1943, he attended the "Army Air Forces 58th College Training Detachment Massachusetts State College"; a photo-copy of a transcript to that effect is annexed. Thereafter, he was in active duty to November 15, 1945 when he received an unqualified Honorable Discharge. He denies saying

Exceptions To The Probation Report

he had been awarded the Purple Heart; according to him, it was Mr. Schramm who suggested that Mr. Ross should have received a Purple Heart and Mr. Ross responded that he had never applied for one.

The Certificate of Honorable Discharge, a photo-copy of which is annexed recites: "This certificate is awarded as a testimonial of Honest and Faithful Service to his country." It recites the following "decorations and citations": "Asiatic Pacific Theatre Ribbon; Good Conduct Ribbon; Victory Ribbon"; service outside continental United States from May 6, 1943 to August 13, 1943; and as the "reason and authority for separation: Certificate of Disability for discharge AR 613-361.

The suffering of a psychological or emotional upset which required psychiatric treatment is no reflection on Mr. Ross; it is not an uncommon concomitant of war service. Fortunately for Mr. Ross, his was a temporary condition, as is evidenced by the career which followed.

5. Scientific Pursuits.

The manuscript of the book Mr. Ross has written (but which was not published) is available for exhibition.

It is also a fact that Mr. Ross is compiling a textbook on "Beneficial Biophysical Effects of Electromagnetic Energy". A "Table of Contents" of that is available for exhibition.

Mr. Ross, indeed has been an "international lecturer" on

Exceptions To The Probation Report

that subject, as is indicated by the annexed photo-copies of programs and certificates listing Mr. Ross as a speaker on his subject at:

The XVIII World Congress of Sports Medicine, at
Oxford September 6 - 11, 1970.

International Congress on Burn Injuries, September
15 - 21, 1974 at Buenos Aires, Argentina.

A convention in Czechoslovakia in 1975.

A Congress in Poland in 1975

The foregoing constitutes a meager sampling of Mr. Ross' activity as a lecturer.

Mr. Ross has been a member of the American Physicians' Fellowship Inc., since August 1963, as appears from the annexed photo-copy of a certificate.

He has been a member of the New York Academy of Sciences since August 1973, as appears from the annexed photo-copy of a certificate; also the American Academy for the Advancement of Science.

The foregoing establish the truthfulness and accuracy of the biographical sketch in the 1975-76 edition of "Who's Who in Finance and Industry" to which the Probation Report refers.

6. Other Activities.

For his Masonic activities he received a Quarter Century Certificate dated May 12, 1975. As early as May, 1951, he received an Award of Honor for his "zeal and enthusiasm" as Chairman of the Masonic Blood Bank of the 6th Manhattan Masonic District". He became

Exceptions To The Probation Report

a Noble of the Mystic Shrine in 1960, was Master of his lodge in 1963, and became a 32 Degree Mason and received other honors. Documentation thereof is annexed.

In 1964 he was honored by the Great Neck Synagogue and North Shore Hebrew Academy with a plaque "Presented to Jesse Ross for Dedicated and Generous Support of the Sacred Values of Hebrew Scholarship and Torah Heritage". He denies that he told Mr. Schramm that he had declined that honor; what he declined was a dinner in his honor for that occasion.

Mr. Ross in the early sixties was active also in organizing and sponsoring community teen age swimming clubs and a Kings Point Pony League.

7. The Dwelling.

The dwelling presently occupied was purchased in June 1959. The repairs, changes and improvements therein were made before the family moved in. The \$125,000 included the cost of those repairs and changes. The mortgage did not come into existence until four years later on August 11, 1963; that mortgage loan had no connection with the repairs, renovations or improvements. The plot is less than two acres -- not three acres. All the taxes on the property aggregate less than \$8,000 per year -- not \$12,000. Unfortunately, the premises have fallen into a state of disrepair for lack of means for proper upkeep. The property has been on the market for sale for

Exceptions To The Probation Report

the last 4 years; no buyer has appeared.

8. Income Tax Returns.

In regard to the tax returns for the years 1973, 1974 and 1975, Mr. Jesse Ross and his C.P.A. brother Joseph Ross assert: Those returns were on the same basis as for previous years. Several of those earlier returns were audited by the I.R.S. No fault was found with any of them, except for minor adjustments. The innuendo concerning the returns is unjustified.

9. The Olympics in Canada.

Mr. and Mrs. Ross were not in Canada on a holiday or spree to attend the Olympic Games. Annexed hereto is a photo-copy of the "Official Supplier Certificate" acknowledging that "Diapulse Corporation of America is an official supplier for the 1976 Olympic Games according to the agreement signed with the Organizing Committee for the 1976 Olympic Games" (COJO). Mr. Ross was in Canada to supervise the performance of that contract with COJO to supply and maintain in good order an adequate number of Diapulses for the treatment of injuries sustained by the athletes. Forty-five such machines were supplied. COJO reported that nearly 3,000 Diapulse treatments were given to athletes from 87 countries at the Polyclinic and at clinics at Game sites for a variety of injuries to athletes. Included among the treated was Princess Anne; she received Diapulse treatment administered by one of Britain's five therapists who were on hand to

Exceptions To The Probation Report

attend to the British athletes. That is reported in the annexed copy of Le Village, the "Official information paper of the Olympic Village", dated July 30, 1976. It is obvious that the F.D.A.'s evaluation of Diapulse is not shared by many (if any) of the other great countries.

10. Miscellaneous.

The fact happens to be that the father of Mr. Ross did not "exemplify the typical success story of the penniless immigrant" and he did not own or operate "a lucrative network of retail meat outlets". All his life he was a poor owner of a kosher butcher shop which was operated with the assistance of his wife; and their children, from their early years, had to work to help support the family; after marriage, they continued to support their father and mother. During their declining twenty years, Mr. Jesse Ross supplied more than 50% of such support.

Mr. Ross denies that he told Mr. Schramm that he obtained the patents from Dr. Ginsberg because "the doctor could not personally market the device due to professional restrictions". There were no "professional restrictions"; he was preoccupied with his medical practice which led Dr. Ginsberg to quit his endeavor to market the device through a corporation named Q.O.S.

For the most part, what is set forth in the foregoing exceptions, is predicated on, and supported by, the annexed or referred to documents. Matters not so supported, except when otherwise indica-

Exceptions To The Probation Report

ted, of course are predicated on information gathered from Mr. and Mrs. Ross and Joseph Ross, which I confidently believe to be true.

Insofar as the Probation Report engages in a review of the litigation and prosecutions, it is respectfully submitted that it cannot add to what the Court already knows much better. Indeed, the report erroneously attributes the November 11, 1971 Preliminary Injunction and the July 1972 Permanent Injunction to Judge Dooling, whereas they were rendered by the late Judge Rosling. How does the Probation Officer know that Mr. Ross "brazenly disregarded" the Permanent Injunction? He is in no position to agree or disagree with the jury's verdict, or to add thereto or subtract therefrom. The jury found guilt, not brazenness.

11. Conclusion.

It is respectfully submitted that although doubtlessly well intended, the Probation Report inadvertently errs in every disparagement it contains, and each thereof should be discountenanced. The documented facts establish that Mr. Ross has been and is a loyal concerned citizen who has served well his country and his community. Even if his zealous missionary belief of the beneficent therapeutic value of Diapulse be misguided -- if indeed it be -- that does not aggravate the charges of which presently he stands found guilty. On the other hand, his good record, in every respect, it is respectfully urged, entitles him to compassion.

Respectfully submitted,

Copied from
COPAL MENTZ,

Exceptions To The Probation Report

Transcript of Record to:

Division:

If you have no further use for this transcript, please return it to the City College, 130th St. and Convent Ave., New York 31, N. Y. under no circumstances to the student.

Record of

Address

Course

Major Field

Worked

Entitled to honorable dismissal.

Still attending in the

Dropped for unsatisfactory work.

Work completed elsewhere is evaluated in terms of the City College curriculum.

The City College imposes no objection to entrance elsewhere.

Explanation of Grades and Symbols.

A - Excellent; B - Good; C - Fair; D - Lowest passing mark; E - Condensed; F - Failure; G - Dropped by student and earned no degree; H - Debarred because of absence; I - Disposed without penalty; K - No college credit, re-entrance condition; L - Passed; M - Incomplete; N - Absent from final examination. Each term is 16 weeks including one week examinations. Each recitation or lecture is 50 minutes long. Each laboratory period is 60 minutes long. In the 8 weeks Summer Session each class meets for periods of double length.

NOT VALID UNLESS SEALED HERE

Dated For The Associate Registrar

Name		Room		Time		Date	
Admitted from		Admitted from		Admitted from		Admitted from	
Admitted from		Admitted from		Admitted from		Admitted from	
Admitted from		Admitted from		Admitted from		Admitted from	
Admitted from		Admitted from		Admitted from		Admitted from	
Admitted from		Admitted from		Admitted from		Admitted from	
Admitted from		Admitted from		Admitted from		Admitted from	
Admitted from		Admitted from		Admitted from		Admitted from	
Admitted from		Admitted from		Admitted from		Admitted from	
Admitted from		Admitted from		Admitted from		Admitted from	
Admitted from		Admitted from		Admitted from		Admitted from	
Admitted from		Admitted from		Admitted from		Admitted from	
Admitted from		Admitted from		Admitted from		Admitted from	
Admitted from		Admitted from		Admitted from		Admitted from	
Admitted from		Admitted from		Admitted from		Admitted from	
Admitted from		Admitted from		Admitted from		Admitted from	
Admitted from		Admitted from		Admitted from		Admitted from	
Admitted from		Admitted from		Admitted from		Admitted from	
Admitted from		Admitted from		Admitted from		Admitted from	
Admitted from		Admitted from		Admitted from		Admitted from	
Admitted from		Admitted from		Admitted from		Admitted from	
Admitted from		Admitted from		Admitted from		Admitted from	
Admitted from		Admitted from		Admitted from		Admitted from	
Admitted from		Admitted from		Admitted from		Admitted from	
Admitted from		Admitted from		Admitted from		Admitted from	
Admitted from		Admitted from		Admitted from		Admitted from	
Admitted from		Admitted from		Admitted from		Admitted from	
Admitted from		Admitted from		Admitted from		Admitted from	
Admitted from		Admitted from		Admitted from		Admitted from	
Admitted from		Admitted from		Admitted from		Admitted from	
Admitted from		Admitted from		Admitted from		Admitted from	
Admitted from		Admitted from		Admitted from		Admitted from	
Admitted from		Admitted from		Admitted from		Admitted from	
Admitted from		Admitted from		Admitted from		Admitted from	
Admitted from		Admitted from		Admitted from		Admitted from	
Admitted from		Admitted from		Admitted from		Admitted from	
Admitted from		Admitted from		Admitted from		Admitted from	
Admitted from		Admitted from		Admitted from		Admitted from	
Admitted from		Admitted from		Admitted from		Admitted from	
Admitted from		Admitted from		Admitted from		Admitted from	
Admitted from		Admitted from		Admitted from		Admitted from	
Admitted from		Admitted from		Admitted from		Admitted from	
Admitted from		Admitted from		Admitted from		Admitted from	
Admitted from		Admitted from		Admitted from		Admitted from	
Admitted from		Admitted from		Admitted from		Admitted from	
Admitted from		Admitted from		Admitted from		Admitted from	
Admitted from		Admitted from		Admitted from		Admitted from	
Admitted from		Admitted from		Admitted from		Admitted from	
Admitted from		Admitted from		Admitted from		Admitted from	
Admitted from		Admitted from		Admitted from		Admitted from	
Admitted from		Admitted from		Admitted from		Admitted from	
Admitted from		Admitted from		Admitted from		Admitted from	
Admitted from		Admitted from		Admitted from		Admitted from	
Admitted from		Admitted from		Admitted from		Admitted from	
Admitted from		Admitted from		Admitted from		Admitted from	
Admitted from		Admitted from		Admitted from		Admitted from	
Admitted from		Admitted from		Admitted from		Admitted from	
Admitted from		Admitted from		Admitted from		Admitted from	
Admitted from		Admitted from		Admitted from		Admitted from	
Admitted from		Admitted from		Admitted from		Admitted from	
Admitted from		Admitted from		Admitted from		Admitted from	
Admitted from		Admitted from		Admitted from		Admitted from	
Admitted from		Admitted from		Admitted from		Admitted from	
Admitted from		Admitted from		Admitted from		Admitted from	
Admitted from		Admitted from		Admitted from		Admitted from	
Admitted from		Admitted from		Admitted from		Admitted from	
Admitted from		Admitted from		Admitted from		Admitted from	
Admitted from		Admitted from		Admitted from		Admitted from	
Admitted from		Admitted from		Admitted from		Admitted from	
Admitted from		Admitted from		Admitted from		Admitted from	
Admitted from		Admitted from		Admitted from		Admitted from	
Admitted from		Admitted from		Admitted from		Admitted from	
Admitted from		Admitted from		Admitted from		Admitted from	
Admitted from		Admitted from		Admitted from		Admitted from	
Admitted from		Admitted from		Admitted from		Admitted from	
Admitted from		Admitted from		Admitted from		Admitted from	
Admitted from		Admitted from		Admitted from		Admitted from	
Admitted from		Admitted from		Admitted from		Admitted from	
Admitted from		Admitted from		Admitted from		Admitted from	
Admitted from		Admitted from		Admitted from		Admitted from	
Admitted from		Admitted from		Admitted from		Admitted from	
Admitted from		Admitted from		Admitted from		Admitted from	
Admitted from		Admitted from		Admitted from		Admitted from	
Admitted from		Admitted from		Admitted from		Admitted from	
Admitted from		Admitted from		Admitted from		Admitted from	
Admitted from		Admitted from		Admitted from		Admitted from	
Admitted from		Admitted from		Admitted from		Admitted from	
Admitted from		Admitted from		Admitted from			

Exceptions To The Probation Report

ALL COMMUNICATIONS SHOULD BE ACCOMPANIED BY CARBON COPY AND ADDRESSED TO

WAR DEPARTMENT

NEW YORK ORDNANCE DISTRICT

ARMY INSPECTOR OF ORDNANCE

In Residence at Potdevin Machine Company
1425 37th Street
Brooklyn, New York

REPLY REFER TO

No. _____

November 12, 1942

To whom it may concern,

I have known Mr. Jesse Ross since 1936 and have always found him to be a gentleman of impeccable character. He possesses a good mind, learns easily and quickly, and manifests poise and leadership.

For the last six months he has been connected with this office as an Inspector of Ordnance Materiel and in all tasks assigned to him, he has been sober-minded, industrious, thorough-going and loyal to every ideal of the Ordnance Dept., U. S. Army.

It is my pleasure to recommend him as a young man of real worth, sterling character and as one who has a profound understanding of American ideals.

Very truly yours,

J. K. Hirsch

J. K. Hirsch, Resident
Inspector of Ordnance

IKH:NV

BEST COPY AVAILABLE



Exceptions To The Probation Report
ALL COMMUNICATIONS SHOULD BE ACCOMPANIED BY CARBON COPY AND ADDRESSED TO

WAR DEPARTMENT
NEW YORK ORDNANCE DISTRICT
ARMY INSPECTOR OF ORDNANCE

REPLY REFER TO

No. _____

Brooklyn, New York
November 16, 1942

To whom it may concern,

The undersigned has known Jesse Ross, 1521 Union Street, Brooklyn, New York, for the past five years and can only say he is honest, industrious, and well thought of by anyone with whom he has been in contact.

I would recommend Mr. Ross for any position offered to him.

Very respectfully yours,

Gerald J. Dawlin
Inspector of Army Ord.

BEST COPY AVAILABLE



-72-
Exceptions To The Probation Report
ARMY AIR FORCES
58th College Training Detachment
Massachusetts State College

Ross, Jesse

12177415

Name

Serial Number

544 East Fifth Street

Brooklyn, N. Y.

Home Address

Street and Number

Town

State

Courses	Grades
Geography	76
Mathematics	70
Physics	70
English	—
History	—
Morse Code	88
—	—
—	88
Civil Air Regulations	75
Medical Aid	—
Physical Education.	—

Passing grade: 70

Condition #

Failed F

Entered March 10, 1943

Days in class--88.

Left July 31, 1943

M. O. Simpson
Registrar

JAN 3 1944

Box 432 141



Honorable Discharge

This is to certify that

JESSE ROSS

12177415, Pvt, Headquarters Squadron Prov Air Depot

Army of the United States

is hereby Honorably Discharged from the military service of the United States of America.

This certificate is awarded as a testimonial of Honest and Faithful Service to this country.

Given at 1263 SCU, Mason General Hospital, Brentwood, New York

Date 15 November 1945

A handwritten signature in dark ink, appearing to read "C. J. O'Donnell".

C. J. O'DONNELL
Colonel, Medical Corps
Commanding

ENLISTED RECORD AND REPORT OF SEPARATION HONORABLE DISCHARGE

Exceptions To
The Probation
Report

1. LAST NAME - FIRST NAME - MIDDLE INITIAL Ross Josse		2. ARMY SERIAL NO. 12177415	3. GRADE Pvt	4. ARM OR SERVICE AC	5. COMPONENT AUS
6. ORGANIZATION Hqs Squadron Prov Air Depot		7. DATE OF SEPARATION 15 Nov 45	8. PLACE OF SEPARATION Mason GH Brentwood NY		
9. PERMANENT ADDRESS FOR MAILING PURPOSES 544 E 5th St Brooklyn NY		10. DATE OF BIRTH 18 Apr 21	11. PLACE OF BIRTH Brooklyn NY		
12. ADDRESS FROM WHICH EMPLOYMENT WILL BE SOUGHT See 9		13. COLOR EYES Green	14. COLOR HAIR Brown	15. HEIGHT 6'3"	16. WEIGHT 190 lbs
17. NO DEPEND		18. CIVILIAN OCCUPATION AND NO. Production Engineer			
18. RACE X WHITE X NEGRO X OTHER (specify)		19. MARITAL STATUS X SINGLE X MARRIED X OTHER (specify)		20. U.S. CITIZEN X YES X NO	

MILITARY HISTORY



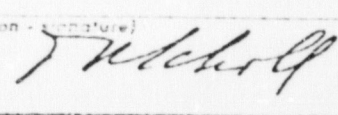
22. DATE OF INDUCTION 24 Nov 42		23. DATE OF ENLISTMENT 28 Jan 43		24. DATE OF ENTRY INTO ACTIVE SERVICE New York City NY	
25. PLACE OF ENTRY INTO SERVICE See 9		26. REGISTERED X YES X NO		27. LOCAL S.S. BOARD NO.	
28. COUNTY AND STATE See 9		29. HOME ADDRESS AT TIME OF ENTRY INTO SERVICE See 9		30. MILITARY OCCUPATIONAL SPECIALTY AND NO. Radio Operator	
31. MILITARY QUALIFICATION AND DATE (i.e., infantry, aviation, etc.) None		32. BATTLES AND CAMPAIGNS None			
33. DECORATIONS AND CITATIONS Asiatic Pacific Theatre Ribbon; Good Conduct Ribbon; Victory Ribbon					
34. WOUNDS RECEIVED IN ACTION None					
35. LATEST IMMUNIZATION DATES SMALLPOX Unknown TYPHOID Unknown TETANUS Unknown OTHER (specify)			36. SERVICE OUTSIDE CONTINENTAL U. S. AND RETURN DATE OF DEPARTURE 25 Apr 45 DESTINATION APTO DATE OF ARRIVAL 6 May 45 18 Aug 45 USA 26 Aug 45		
37. TOTAL LENGTH OF SERVICE CONTINENTAL SERVICE 2 YEARS 7 MONTHS 21 DAYS FOREIGN SERVICE 0 YEARS 4 MONTHS 1 DAYS			38. HIGHEST GRADE HELD Pvt		
39. PRIOR SERVICE None			40. REASON AND AUTHORITY FOR SEPARATION Certificate of Disability for Discharge AR 615-361		
41. SERVICE SCHOOLS ATTENDED Radio School- Scott Fld Ill			42. EDUCATION (Years) 4 5 0		

PAY DATA

43. LONGEVITY FOR PAY PURPOSES 2 YEARS 11 MONTHS 22 DAYS			44. MUSTERING OUT PAY \$ 300 TOTAL \$ 100 THIS PAYMENT		45. SOLDIER DEPOSITS NONE		46. TRAVEL PAY \$ 2.15		47. TOTAL AMOUNT, NAME OF DISBURSING OFFICER 102.15 CO PRICE Lt Col FD	
--	--	--	---	--	-------------------------------------	--	----------------------------------	--	---	--

INSURANCE NOTICE

IMPORTANT IF PREMIUM IS NOT PAID WHEN DUE OR WITHIN THIRTY-ONE DAYS THEREAFTER, INSURANCE WILL LAPSE. MAKE CHECKS OR MONEY ORDERS PAYABLE TO THE TREASURER OF THE U. S. AND FORWARD TO COLLECTIONS SUBDIVISION, VETERANS ADMINISTRATION, WASHINGTON 25, D. C.											
48. KIND OF INSURANCE X Nat. Serv. X U.S. Govt X None		49. HOW PAID X Allotment X Direct to V. A.		50. Effective Date of Allotment Discontinuance 31 Oct 45		51. Date of Next Premium Due (One month after 50) 30 Nov 45		52. PREMIUM DUE EACH MONTH \$ 6.60		53. INTENTION OF VETERAN TO X Continue X Continue Only X Discontinue	

54. RIGHT THUMB PRINT 		55. REMARKS (This space for completion of above items or entry of other items specified in W. D. Directives) Lapel Button issued. Inactive Service ERC from 24 Nov 42 to 27 Jan 43.	
56. SIGNATURE OF PERSON BEING SEPARATED 		57. PERSONNEL OFFICER (Type name, grade and organization - signature) T R SCHOLL, Capt MAC CO Det of Patients /mmcg 	



XVIII WORLD CONGRESS OF SPORTS MEDICINE

Oxford

6 - Fifth September 1970

Programme

Injuries P. Heidensohn, S. Nilsson, P. H. Staff,
W. Groher, N. Stanescu, V. Iliescu,
M. Lioungas, N. Triantafyllou, P. N. Sperry,
J. E. Buck, H. Frings, B. Nesovic, K. Franke

Therapy D. Ryde, V. Iliescu, N. Stanescu,
M. Avren, Z. S. Mironova *et al*, V. K. Goel,
B. Sengupta, O. Schwinger, J. Ross,
H. J. Niemeyer, W. Rakusin

Other Papers W. E. Tucker, Z. Hornof, C. Napravnik,
M. Docovski, N. Hristov, Dr. Urruticoechea

WEDNESDAY 9TH SEPTEMBER

09.15 *Large Hall* "The Nature of Training Stress"

Chairman Dr. Roger Bannister

Speakers J. D. Brooke, E. J. Hamley, P. T. Stone,
I. Szmodis, J. Malomsoki, J. S. Skinner,
R. Hutsler, V. Bergsteinova, E. R. Buskirk,
C. T. M. Davies, A. V. Knibbs, R. C. Goode,
J. A. Dempsey, A. S. Rebeck

09.15 *Small Hall* Free Themes

11.45 *Large Hall* Address: Dr. L. G. C. E. Pugh "The Influence of Air
Resistance and Wind in Running and Walking"

LUNCH

14.00 *Large Hall* "New Techniques"

Chairman Mr. John Buck

POLSKIE TOWARZYSTWO LEKARSKIE
ODDZIAŁ W KRAKOWIE
UL. ŁOBZOWSKA 39 B/3

Kraków, dnia 5 kwietnia 1975 r.

Z A P R O S Z E N I E

Zarząd Krakowskiego Oddziału Polskiego Towarzystwa Lekarskiego zaprasza na nadzwyczajne wspólne posiedzenie naukowe z Krakowskim Oddziałem Towarzystwa Chirurgów Polskich, które odbędzie się w dniu

15 kwietnia /wtorek/ 1975 r.

o godz. 12-tej w sali wykładowej I KLINIKI CHIRURGICZNEJ AM
w Krakowie, ul. Kopernika 40 z następującym programem:

Jesse Ross /USA/

- Zastosowanie energii elektromagnetycznej w przyspieszeniu procesu gojenia /z pokazem filmów/.

Za Zarząd

Sekretarz

/-/ Lek. Marek Poźniczek



Przewodniczący

/-/ Prof. dr Józef Bogusz

TOWARZYSTWO CHIRURGÓW POLSKICH
ODDZIAŁ WE WROCŁAWIU

WSPÓLNIE Z

WROCŁAWSKIM ODDZIAŁEM POLSKIEGO TOWARZYSTWA
ORTOPEDYCZNEGO I TRAUMATOLOGICZNEGO

WROCŁAWSKIM ODDZIAŁEM POLSKIEGO TOWARZYSTWA
UROLOGICZNEGO

WROCŁAWSKIM ODDZIAŁEM TOWARZYSTWA CHIRURGÓW
DZIECIĘCYCH

ORAZ

WROCŁAWSKIM ODDZIAŁEM POLSKIEGO TOWARZYSTWA
OTOLARYNGOLOGICZNEGO

i

WROCŁAWSKIM ODDZIAŁEM POLSKIEGO TOWARZYSTWA
STOMATOLOGICZNEGO

zaprasza

NA

NADZWYCZAJNE POSIEDZENIE NAUKOWE

18

które odbędzie się dnia 15 kwietnia 1975 r., godz. 16-tej w sali wykładowej
Instytutu Chirurgii A.M. we Wrocławiu przy ul. Marii Skłodowskiej-Curie 65

*U w a g a: Uczestnictwo w operacjach pokazowych i posiedzeniach naukowych
Towarzystwa jest częścią składową szkolenia podyplomowego lekarzy-
chirurgów — zgodnie z programem Akademii Medycznej oraz Ośrodka
Doskonalenia Kadr Medycznych Dolnośląskiego Zespołu Przychodni Specja-
listycznych we Wrocławiu.*

PROGRAM
214 POSIEDZENIE NAUKOWE
godzina 16-ta

Porządek obrad:

- I. Ross (USA):
Wpływ biofizyczny pulsującej energii elektromagnetycznej na regenerację nerwów obwodowych.
(Biophysical effects of pulsed electromagnetic energy on peripheral nerve regeneration)
- I. Ross:
Wpływ biofizyczny pulsującej energii elektromagnetycznej na przyspieszenie gojenia się kości i innych tkanek.
(Biophysical effects of pulsed electromagnetic energy on acceleration of bone and tissue healing)

Filmy:

1. Chirurgia jamy ustnej.
2. Tonsilektomia.

Za Zarządy:

Przewodniczący
Wr. Oddz. P.T. Otolaryng.
(—) Prof. dr W. Jankowski

Przewodniczący
Wr. Oddz. P.T. Stomat.
(—) Dr med. F. Mraz

Przewodniczący
Wr. Oddz. T.Ch.P.
(—) Prof. dr habil. S. Koczorowski

Sekretarz
Wr. Oddz. T.Ch.P.
(—) Prof. dr habil. O. Bader

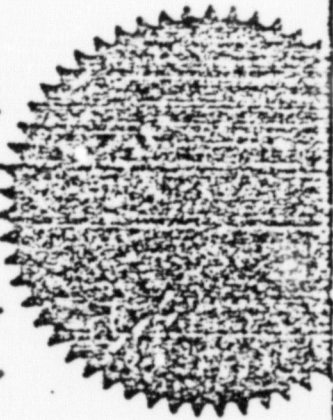
Exceptions To The Probation Report

American Physicians Fellowship Inc.
Israel Medical Association
התאחדות רופאים ישראלים

JESSE ROSS

has been duly elected an associate member of the American Physicians
Fellowship, Inc. for the Israel Medical Association
this 30th day of August 1963.

In Witness Whereof, we have affixed our seal.



George L. Lohr M.D.

Harold M. Slogin M.D.

THE
NEW YORK
ACADEMY OF SCIENCES

PRESENTED TO

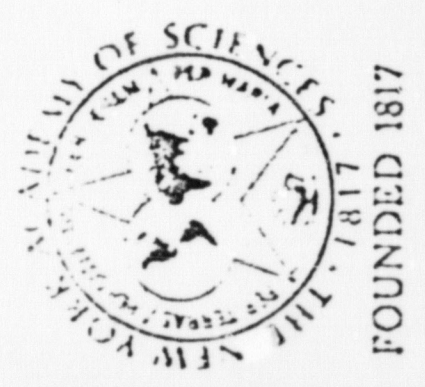
Jesse Kuss

IN RECOGNITION AND CERTIFICATION OF BEING ELECTED
AN ACTIVE MEMBER OF
THIS ACADEMY

August 23, 1973

Kenneth Wake Thompson
PRESIDENT

Philip Fargelson
SECRETARY



Exceptions To The Probation Report



AMERICAN ASSOCIATION FOR
THE ADVANCEMENT OF SCIENCE

1515 Mass. Ave. N.W. Washington, D.C. 20005

RENEWAL
NOTICE

PROMPT PAYMENT WILL GUARANTEE UNINTERRUPTED DELIVERY OF SCIENCE. PLEASE MAKE CHECK
PAYABLE TO AAAS OR SCIENCE AND RETURN THIS CARD WITH YOUR REMITTANCE. THANK YOU.

YOUR CURRENT MEMBERSHIP AND SUBSCRIPTION TO SCIENCE
EXPIRED ON 08/20/75. TO RENEW PLEASE REMIT:

JESSE ROSS
382 E SHORE RD
GREAT NECK NY 11023

MEMBERSHIP DUES:	\$25.00
POSTAGE:	0.00

TOTAL:	\$25.00

49.0% DESIGNATED FOR SCIENCE.

R343 449324G 3RD NOTICE

-81-

Exceptions To The Probation Report



MASONIC PUBLIC RELATIONS
ROOM 1818
Oregon 5-2720

GRAND LODGE
FREE AND ACCEPTED MASONS

OF THE
STATE OF NEW YORK

MASONIC HALL
71 WEST 23rd STREET
NEW YORK 10, N. Y.

AWARD OF HONOR

to

JESSE ROSS

- FOR: His zeal and enthusiasm as Chairman of the Masonic Blood Bank of the Sixth Manhattan Masonic District, and
- FOR: His diligent work in presenting the need for increasing the deposits of the Sixth Manhattan District in the Masonic Blood Bank, and
- FOR: His creative ideas for dramatizing the need for blood as a life-saving gift to our Brothers and their families when they are sick and in distress, and
- FOR: His ready cooperation at all times in the planning, execution and recording of donations at the American Red Cross Mobile Units set up at the Masonic Temple in New York City,

BE IT KNOWN

That the Gratitude and Thanks of all Brothers of Jesse Ross, Courland Lodge No. 885, Free and Accepted Masons of the State of New York, shall herewith publicly be expressed with the further commendation that Brother Ross has proved himself to be a loyal and devoted member of the Craft.

May 22, 1951

Maurice M. Witherspoon
MAURICE M. WITHERSPOON
Chairman
Masonic Blood Bank

Exceptions To The Probation Report

The Imperial Council
of the
Ancient Arabic Order
of the

Nobles of the Mystic Shrine
for North America

*For all True and Faithful Nobles of the Mystic Shrine:
Know Ye that the "Worthy Noble"*

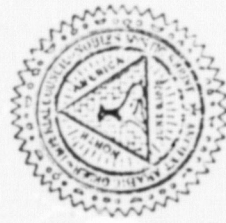
JESSE ROSS

*was regularly Received, Admitted and Constituted
A Noble of the Mystic Shrine in*

SALAAM Temple of NEWARK, NEW JERSEY

*On the 18th day of OCTOBER, 1960, and that he is duly
Enrolled as such upon the Records of the Order.*

*In Testimony Whereof We have hereunto
subscribed our Names, and affixed the Seal of
The Imperial Council for North America*



Attest: Thompson Saunders, Superior Shrine

*SALAAM Temple
J. Hawang Sauro*

*And if any shall
demand protection of
thee, grant him protection
that he may have the unit
of the Prophet, and after
ward give him a safe con-
duct, that he may return
home again securely.*

Koran IX

*عليه
السلام*

BEST COPY AVAILABLE

*Sixth Masonic District Association
of Manhattan, Inc.*

FORTY-FIFTH ANNIVERSARY

CHARITY ENTERTAINMENT & DANCE



BEST COPY AVAILABLE

Exceptions To The Probation Report

Sixth Masonic District Association of Manhattan, Inc.



Courland Lodge No. 885

Free and Accepted Masons

OFFICERS FOR 1963

W. JESSE ROSS	Master
BERNARD FREEDMAN	Senior Warden
I. PAUL RISCH	Junior Warden
W. JACOB WITTNER	Secretary
W. HENRY TEPPER	Treasurer
W. THEODORE STEINBERG	Chaplain
ALBERT WAHL	Senior Deacon
MARTIN RADIN	Junior Deacon
JERRY BRUNELL	Senior Master of Ceremony
THEODORE PORIS	Junior Master of Ceremony
SIDNEY LUPU	Marshal
LEON ROSS	Steward
WERNER STEIN	Steward
JACQUES HERTZ	Organist
MAX BLACKMAN	Tiler

TRUSTEES

Right Wor. IRVING A. KASS	Right Wor. FRANK L. MILLER	Right Wor. ARCHIE F. KARMAN
	Right Wor. HARRY HERSHFIELD	

PAST MASTERS

Arthur Leventhal	1910-1911	Benjamin J. Hurwitz	1928	Jacob Wittner	1945
*Meyer A. Wolfson	1912	Louis Smirnaw	1929	Harry R. Freeman	1946
*Joseph Immerman	1913	*Emanuel Seigel	1930	Samuel B. Herbst	1947 -
*Alfred Wolfson	1914	Harold Berg	1931	Sidney Conescu	1948 -
*Adolph S. Feitelberg	1915	George L. Brutman	1932	R. W. Frank L. Miller	1949 -
*Harry Lipschutz	1916	*Herman Gottlieb	1933	Robert Witt	1950 -
*Isidor Berg	1917	Sidney Greenberg	1934	*Robert R. Greenberg	1951
R. W. Charles Doris	1918	Abe Meller	1935	Jules Lennard	1952 -
Leo Levy	1919 -	Dr. Joseph Serxner	1936	Herbert Kass	1953 -
Bernhard H. Berger	1920	Shepard Broad	1937	Lawrence H. Karman	1954
*Simon S. Hamburger	1921	Jack Siegel	1938	David S. Radzely	1955
Arthur E. Berman	1922	Isidore Immerman	1939	Myron Karman	1956
Emanuel L. Rosing	1923	Joseph Greenfield	1940	Robert Levine	1957
Joseph Michaelson	1924	J. Sloane Immerman	1941	Henry Tepper	1958
*Adolph Serxner	1925	David Kravitz	1942	Sol Bergman	1959
R. W. Irving A. Kass	1926	*William Stein	1943	Theodore Kass	1960
R. W. Archie F. Karman	1927	Bernard S. Klein	1944	Milton Sussman	1961
				Theodore Steinberg	1962

* Deceased

AMERICAN INSTITUTE OF MANAGEMENT



This is to Certify that

Jess Ross

*is an Associate Member in good standing
for the year ending November, 57*

Jackson Matthews
PRESIDENT

-85-

Exceptions To The Probation Report

ANCIENT ACCEPTED SCOTTISH RITE

VALLEY OF NEW YORK CITY

This is to Certify that Brother

JESSE ROSS

Signature of Member

is a Member of

Lodge of Perfection 14°

Council of Princes of Jerusalem 15°

Chapter of Rose Croix 18°

Consistory 32°

in good standing to December 31st, 1973

Jesse H. Goshans 33°
Secretary

THIS CARD REQUIRED FOR ADMISSION

RECORD OF BLOOD DONATIONS	
Date	Classification
10-17-50	GROUP
1-22-51	GROUP
4-52	GROUP
SEP 22 1953	GROUP
OCT 10 1953	GROUP
JUNE 1956	GROUP
NOV 27 1956	GROUP

Issued by New York Regional Blood Program

QUADRANTAL CENTENNIAL CERTIFICATE

presented to

W. Jesse Ross

in recognition of his devotion to Masonry and his loyalty to

Courland Centennial Lodge No. 763

M. & A. M. - State of New York

Raised June 12, 1950

Date May 12, 1975

Emil H. Friedlander Mast

Frank L. Miller Secre



PRESENTED TO
THE GREAT NORTH SHORE
SYNAGOGUE
FOR DEDICATION AND GENEROUS SUPPORT
OF THE SACRED VALUES
OF HEBREW SCHOLARSHIP
AND JEWISH HERITAGE
JUNE 1964

Exceptions To The Probation Report



Jeux de la
XXIe Olympiade
Montréal
1976

Games of the
XXI Olympiad
Montréal
1976

Certificat de
fournisseur officiel

Official
Supplier Certificate

Numéro

1117

Number

1117

Nous certifions que la compagnie

This certificate acknowledges that

DIAPULSE CORPORATION OF AMERICA

est devenue un fournisseur officiel du Cojo
(Le Comité organisateur des Jeux olympiques
de 1976) en vertu d'un contrat
signé avec le Cojo,

is an Official Supplier for the 1976 Olympic
Games according to the agreement signed
with the Organizing Committee for the 1976
Olympic Games,

L'entente comprend le produit même
et/ou l'entretien de:

The agreement covers the product itself
and/or maintenance of:

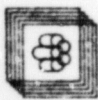
DIAPULSE MEDICAL INSTRUMENT

"OFFICIAL SUPPLIER TO THE 1976 OLYMPIC GAMES"

Vice-président au Revenu
Vice-president, revenue

Président et Commissaire général
President and commissioner general





Le Village

Météo

Nuageux
MAX: 26°C

MIN: 15°C

Weather

Cloudy

MAX: 26°C

MIN: 15°C

Organe d'information officiel
du Village olympique

Official information paper
of the Olympic Village

Numéro 30

Vendredi 30 juillet 1976

Number 30

Friday, July 30, 1976

British physiotherapists kept busy during Games

Three physiotherapists were too few for the British team in Munich, so this time they brought five. And they're still kept busy day and night.

"We worked our feet off for 21 days in Munich. So this time we brought five. This way we get half a day off a week," says Veida Barclay, normally a senior lecturer at Nonington College of Physical Education, Dover, England.

The British team's personal physios cope with 30 or more injuries a day, most being pulled muscles, swollen knees and abrasions.

One cyclist needed therapy after a pedal crashed into his knee while he was carrying his bike for a few short paces. Then a rower needed treatment for a cartilage injured while playing badminton, smiled Barclay, who is a veteran of Games in Munich, Mexico City and Innsbruck.

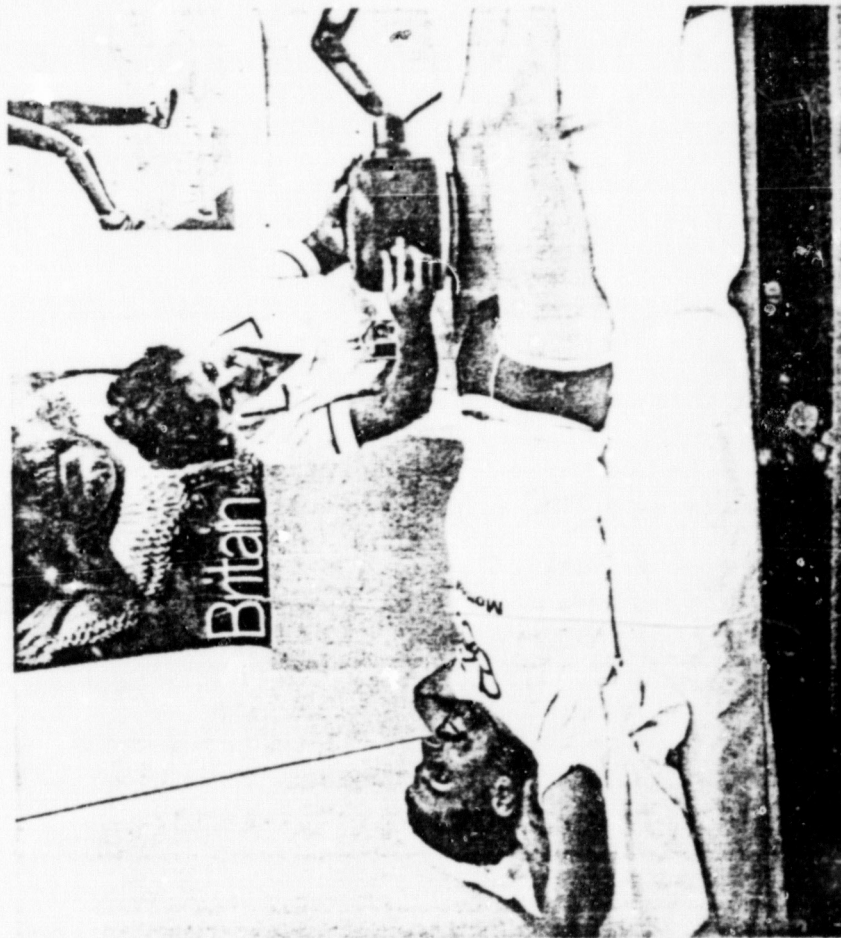
Some athletes who finish a heat one day and run a final the next enjoy a massage. "After a septic toe. And then there were the back injuries among members of the judo and wrestling teams.

Britain's five physios go to different venues sometimes, one specializing in cycling events, others in equestrian or athletics. Asked if one member of this clinic patched up Princess Anne following her fall at Bromont last week, Miss Barclay replied that she had gone there for only a day but stayed two because of the fall.

"Nobody is certain what happened," she says. "But it looked like the horse fell one way and Princess Anne the other, and the horse possibly kicked her on the arm. It was very painful. But she had six treatments and 24 hours later entered the jumping event and did a clear round."

"The concussion was real too," adds Miss Barclay. "The Princess hit the ground pretty hard but was alright hours later. She had no headache. If you apply treatment early, you usually get good results."

Asked what equipment they brought with them to add to their five-bed clinic, Miss Barclay replies that she brought her own ultra-sound equipment and asked that a diapulse be installed. "If we hadn't made our own arrangements about these," she says, "we would have had to go to the COJO



United States District Court for
Eastern Dist. of NY

United States of America vs.

M.P. FILED

M.P. FILED

DEFENDANT

JESSE ROSS

DOCKET NO.

75 CR 902

JUDGMENT AND PROBATION/COMMITMENT ORDER

In the presence of the attorney for the government
the defendant appeared in person on this date

MONTH DAY YEAR
8 27 1976

COUNSEL

☐ WITHOUT COUNSEL However, the court advised defendant of right to counsel and asked whether defendant desired to have counsel appointed by the court and the defendant thereupon waived assistance of counsel.
☒ WITH COUNSEL Copal Mintz, Esq.
(Name of counsel)

PLEA

☐ GUILTY, and the court being satisfied that there is a factual basis for the plea, ☐ NOLO CONTENDERE, ☐ NOT GUILTY

FINDING &
JUDGMENT

There being a finding/verdict of ☐ NOT GUILTY. Defendant is discharged
☒ GUILTY in count 1

Defendant has been convicted as charged of the offense(s) of violating permanent injunction in Civil Action 68 C 391 on July 18, 1974, this Court issued and filed a permanent injunction enjoining Diapulse Corp. of America and since the issuance of said injunction and while same was in full force and effect and in defiance of its terms, did disobey and violate said order of permanent injunction

The court asked whether defendant had anything to say why judgment should not be pronounced. Because no sufficient cause to the contrary was shown, or appeared to the court, the court adjudged the defendant guilty as charged and convicted and ordered that:

SENTENCE
OR
PROBATION

On the Jury verdict of guilty on count 2 of the Petition the defendant is fined \$2,500.00. Execution of the sentence is stayed pending appeal.

ADDITIONAL
CONDITIONS
OF
PROBATION

In addition to the special conditions of probation imposed above, it is hereby ordered that the general conditions of probation set out on the reverse side of this judgment be imposed. The Court may change the conditions of probation, reduce or extend the period of probation, and at any time during the probation period or within a maximum probation period of five years permitted by law, may issue a warrant and revoke probation for a violation occurring during the probation period.

COMMITMENT
RECOMMEN

The court orders commitment to the custody of the Attorney General and recommends,

It is ordered that the Clerk deliver a certified copy of this judgment and commitment to the U.S. Marshal or other qualified officer

☒ U.S. District Judge

☐ U.S. Magistrate

U.S. DIST. COURT OFFICE
U.S. DIST. OF COURTY, NY
AUG 30 1976

TIME A.M.
P.M.

[Signature]
Date 8/30/76

United States of America vs.

H'PL. AD
H'PLINE

United States District Court
Eastern District of NY

DEFENDANT

JOSEPH I. ROSS, Vice-President
and Treasurer of Diapulse Corp of America

75 CR 902

JUDGMENT AND PROBATION/COMMITMENT ORDER

In the presence of the attorney for the government
the defendant appeared in person on this date

MONTH 8 DAY 27 YEAR 1975

COUNSEL

☐ WITHOUT COUNSEL

However the court advised defendant of right to counsel and asked whether defendant desired to have counsel appointed by the court and the defendant thereupon waived assistance of counsel.

☒ WITH COUNSEL

Copal Mintz, Esq.

(Name of counsel)

PLEA

☐ GUILTY, and the court being satisfied that there is a factual basis for the plea,

☐ NOLO CONTENDERE,

☐ NOT GUILTY

FINDING & JUDGMENT

There being a finding/verdict of
☐ NOT GUILTY. Defendant is discharged
☒ GUILTY counts 1 and 2

Defendant has been convicted as charged of the offense(s) of violating permanent injunction in Civil Action 68C 391 on July 18, 1974 this Court issued and filed a Permanent Injunction enjoining Diapulse Corporation of America and since the issuance of said injunction and while injunction was in full force and effect and in defiance of its terms did disobey and violate said order of permanent injunction

SENTENCE OR PROBATION ORDER

The court asked whether defendant had anything to say why judgment should not be pronounced. Because no sufficient cause to the contrary was shown, or appeared to the court, the court adjudged the defendant guilty as charged and convicted and ordered that:

On the Jury verdict of guilty on counts 1 and 2 of the Petition the defendant is fined \$625.00 on each count making in all total fine of \$1,250.00. Execution of the sentence is stayed pending appeal.

SPECIAL CONDITIONS OF PROBATION

RECOMMENDATION

A TRUE COPY
DATED *Aug 30 1976*
LEWIS ORLOFF
BY *William J. Hahn* CLERK
DEPUTY CLERK

FILED
U.S. DISTRICT COURT E.D. NY

AUG 30 1976

TIME A/M P.M.

SIGNED BY
☒ U.S. District Judge

☐ U.S. Magistrate

John H. ...
8/30/76

DEFENDANT

DIAPULSE CORP. OF AMERICA

DOCKET NO.

75 CR 902

JUDGMENT AND PROBATION/COMMITMENT ORDER

In the presence of the attorney for the government
the defendant appeared in person on this date

MONTH DAY YEAR
8 27 1976

COUNSEL

☐ WITHOUT COUNSEL

However, the court advised defendant of right to counsel and asked whether defendant desired to have counsel appointed by the court and the defendant thereupon waived assistance of counsel.

☒ WITH COUNSEL

Copal Montz, Esq.

(Name of counsel)

PLEA

☐ GUILTY, and the court being satisfied that there is a factual basis for the plea,

☐ NOLO CONTENDERE,

☐ NOT GUILTY

There being a finding/verdict of

☐ NOT GUILTY Defendant is discharged

☒ GUILTY counts 1 and 2

FINDING & JUDGMENT

Corporation
Defendant has been convicted as charged of the offense(s) of violating permanent injunction in Civil Action 68 C 391 on July 18, 1974 this Court issued and filed a permanent injunction enjoining Diapulse Corporation of America and since the issuance of said injunction and while same was in full force and effect and in defiance of its terms, did in disobey and violate said order of permanent injunction

corporation

The court asked whether defendant had anything to say why judgment should not be pronounced. Because no sufficient cause to the contrary was shown, or appeared to the court, the court adjudged the defendant guilty as charged and convicted and ordered that:

SENTENCE OR PROBATION ORDER

On the Jury verdict of guilty on counts 1 and 2 of the Petition the defendant Corporation is fined \$1,250 on each count making in all \$2,500. Execution of sentence is stayed pending appeal.

SPECIAL CONDITIONS OF PROBATION

A TRUE COPY
ATTEST
DATED September 9, 1976
LEWIS ORGEL
CLERK
BY William J. North
DEPUTY CLERK

U.S. DISTRICT COURT, N.Y.

AUG 30 1976

TIME AM P.M.

ADDITIONAL CONDITIONS OF PROBATION

In addition to the conditions of probation imposed above, it is hereby ordered that the general conditions of probation set out on the reverse side of this judgment be imposed. The Court may change the conditions of probation, reduce or extend the period of probation, and at any time during the probation period or within a maximum probation period of five years permitted by law, may issue a warrant and revoke probation for a violation occurring during the probation period.

COMMITMENT RECOMMENDATION

The court orders commitment to the custody of the Attorney General and recommends,

It is ordered that the Clerk deliver a certified copy of this judgment and commitment to the U.S. Marshal or other qualified officer.

SIGNED BY

☒ U.S. District Judge

☐ U.S. Magistrate

[Handwritten signature]
8/30/76

Notice of Appeal
(filed August 30, 1976).
UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,

Docket Number

75 CR 902

Plaintiff,

JOHN F. DOOLING, JR.

-against-

(District Court Judge)

DIAPULSE CORPORATION OF AMERICA,
etc., et al, Defendants

NOTICE OF APPEAL

of them

Notice is hereby given that the defendants above named and each/ appeals to

the United States Court of Appeals for the Second Circuit from the ☐ Judgment ☐ order ☐ other
criminal contempt
(specify conviction and sentence) August 27, 1976
entered in this action on

Copal Mintz (Date)
COPAL MINTZ

(Counsel for Appellant)
150 Broadway,
New York, N.Y. 10038

Date August 30, 1976
To: Clerk, United States District Court
Eastern District
Clerk, Court of Appeals
David G. Trager, Esq., U.S. Attorney

Address

212-227-7070

Phone Number

ADD ADDITIONAL PAGE IF NECESSARY

(TO BE COMPLETED BY ATTORNEY)

TRANSCRIPT INFORMATION - FORM B

QUESTIONNAIRE

TRANSCRIPT ORDER

DESCRIPTION OF PROCEEDINGS
FOR WHICH TRANSCRIPT IS
REQUIRED (INCLUDE DATE)

☐ I am ordering a transcript
☐ I am not ordering a transcript
Reason:
☐ Daily copy is available
☐ U.S. Attorney has placed order
☐ Other. Attach explanation

Prepare transcript of (One installment not yet delivered)
☐ Pre-trial proceedings (Ordered by letter dated July 1, 1976)
☐ Trial
☐ Sentence
☐ Post-trial proceedings

The ATTORNEY certifies that he will make satisfactory arrangements with the court reporter for payment of the cost of the transcript. (FRAP 10(b)) ☐ Method of payment ☐ Funds ☐ CJA Form 21

ATTORNEY'S signature

Copal Mintz

DATE August 30, 1976

COURT REPORTER ACKNOWLEDGEMENT

To be completed by Court Reporter and
forwarded to Court of Appeals.

Date order received

Estimated completion date

Estimated number
of pages.

Date

Signature

(Court Reporter)

COPY FOR DEFENDANT

Amended Notice of Appeal
(filed September 3, 1976)

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,

Docket Number

75 CR 902

Plaintiff,

JOHN F. DOOLING, JR.

(District Court Judge)

-against-

DIAPULSE CORPORATION OF AMERICA, also
known as THE DIAPULSE MANUFACTURING
CORPORATION OF AMERICA, a corporation,
JESSE ROSS, President of the Corporation,
and ~~JOSEPH ROSS~~, Vice-President and
Treasurer of the Corpora- NOTICE OF APPEAL
tion. Defendants.

AMENDED

of them

Notice is hereby given that the defendants above named and each/ appeals to

the United States Court of Appeals for the Second Circuit from the ☐ Judgment ☐ order ☐ other
criminal contempt
(specify) conviction and August 27, 1976
sentence entered in this action on

Copal Mintz (Date)
COPAL MINTZ

(Counsel for Appellant)
150 Broadway,
New York, N.Y. 10038

Date August 30, 1976
To: Clerk, United States District Court
Eastern District
Clerk, Court of Appeals
David G. Trager, Esq., U.S. Attorney

Address

212-227-7070

Phone Number

ADD ADDITIONAL PAGE IF NECESSARY

(TO BE COMPLETED BY ATTORNEY)

TRANSCRIPT INFORMATION - FORM B

QUESTIONNAIRE

TRANSCRIPT ORDER

DESCRIPTION OF PROCEEDINGS
FOR WHICH TRANSCRIPT IS
REQUIRED (INCLUDE DATE).

☒ I am ordering a transcript
☐ I am not ordering a transcript

Reason:

☐ Daily copy is available
☐ U.S. Attorney has placed order
☐ Other. Attach explanation

Prepare transcript of (One installment not yet delivered)
☐ Pre-trial proceedings
☐ Trial
☐ Sentence
☐ Post-trial proceedings

The ATTORNEY certifies that he will make satisfactory arrangements with the court reporter for payment of the cost of the transcript. (FRAP 10(b)) ☒ Method of payment ☐ Funds ☐ CJA Form 21

ATTORNEY'S signature

Copal Mintz

DATE August 30, 1976

COURT REPORTER ACKNOWLEDGEMENT

To be completed by Court Reporter and
forwarded to Court of Appeals.

Date order received

Estimated completion date

Estimated number
of pages.

Date

Signature

(Court Reporter)

COPY FOR DEFENDANT

Trial Transcript
(Cont'd. to page 316)

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

-----x
: UNITED STATES OF AMERICA, : 75 CR 902
: -against- :
: DIAPULSE CORP., :
: Defendant. :
: -----x

United States Courthouse
Brooklyn, New York

June 28, 1976
10:00 o'clock A.M.

B e f o r e :

HONORABLE JOHN F. DOOLING, U.S.D.J.

Appearances:

DAVID G. TRAGER, ESQ.,
United States Attorney
for the Eastern District of New York

BY: CYRIL HYMAN, ESQ.
Assistant U.S. Attorney

COPAL MINTZ, ESQ.
Attorney for Defendant

-94-
Trial Transcript
Motion to Dismiss

[4]

CLERK: United States of America against Diapulse Corporation.

THE COURT: Are you ready to select a jury, gentlemen?

MR. HYMAN: Yes, Your Honor.

MR. MINTZ: If Your Honor pleases?

THE COURT: Yes?

MR. MINTZ: I handed up a memorandum. I don't know whether Your Honor has seen it or not.

THE COURT: Yes, sir.

MR. MINTZ: And the purpose of my memorandum is to try to convince Your Honor that the indictment -- the petition should be dismissed as to the two remaining counts. The basis of it is that under the section, Bill of Particulars, the government states its position to be that the F.D.A. could authorize inspection only under its own procedures, and therefore they were required to give written notice, that written notice as Your Honor knows was limited to inspection under the act.

THE COURT: Yes. I think we fully considered all of this in the earlier stages.

MR. MINTZ: I'm not raising anything new, but in reviewing the papers, in preparation for trial, I became

BEST COPY AVAILABLE

Trial Transcript
Motion to Dismiss

[5]

1
2 thoroughly convinced to try this case would be a waste
3 of time?

4 THE COURT: Would be a what?

5 MR. MINTZ: A waste of time and I ask Your Honor
6 --

7 THE COURT: Let me ask this of you; I suppose
8 within limits there isn't much controversy about what
9 happened?

10 MR. MINTZ: That's right.

11 THE COURT: And I would therefore expect that
12 counsel on both sides, unless we get to the critical
13 points, it would be cooperative to see that we move
14 along quickly. Now, I think the points which you have
15 made are spelled out in detail in this record, are
16 carefully preserved and if your rights --

17 MR. MINTZ: Yes, Your Honor?

18 THE COURT: So that the course of discretion
19 would seem to be to conduct the trial rather than to
20 in effect reargue what would be the second time,,because
21 the case was both reargued and reargued already.

22 At this point, which unless I display a good
23 deal more versatility of opinion than I usually do,
24 its bound in my reaching the exact same conclusion
25 again.

MR. MINTZ: I don't quite understand what Your

Trial Transcript
Motion to Dismiss

[6]

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

Honor is referring to --

THE COURT: If you want to reargue the motion again?

MR. MINTZ: No, I do not.

THE COURT: I'm reasonably confident that you will not persuade me.

MR. MINTZ: The reason I'm doing that, is because as I read Your Honor's memorandum you have expressed considerable doubt.

THE COURT: What?

MR. MINTZ: You have expressed considerable doubt.

THE COURT: I won't decide the case on the merits. I'll tell you that.

MR. MINTZ: I realize that, but the mere rights are not very much different than what has already been disclosed --

THE COURT: It is not that. I reject your central argument that this had to be a THREE SEVEN FOUR ARRAY and couldn't be anything else. It couldn't be anything else and it is sufficient as such.

MR. MINTZ: I do not argue that.

THE COURT: It seems to me you are dragging along a closed argument.

Trial Transcript
Motion to Dismiss

[1]

1
2 MR. MINTZ: But what I argued, they proceeded
3 under 374 --

4 THE COURT: Yes. That is what I say.

5 MR. MINTZ: It did not make clear that they
6 were operating under the injunction.

7 THE COURT: That is an issue of fact. That is
8 an issue of fact that we had before us.

9 MR. MINTZ: That is what we have here, Your
10 Honor, and I'm going to press this very strongly. I
11 just point out what we have here is a submission of a
12 written notice which is limited by its terms.

13 THE COURT: You see, the second Bill of Particu-
14 lars, we have spelled out in further detail, two
15 October episodes. They in effect said what you say,
16 but the July episode may well be true. Although we
17 still think that the July episode was a contempt and,
18 if the government prevails on any count, and to appeal,
19 they will certainly argue on appeal that if the Court
20 of Appeals reverses they ought to send it back for
21 trial on all three counts, not just the latter two.

22 Is that right Mr. Hyman?

23 MR. HYMAN: Absolutely, Your Honor.

24 THE COURT: So there we are.

25 MR. MINTZ: The one thing that I want to make

Trial Transcript
Motion to Dismiss

[8]

1 clear, Your Honor, is my contention that since the
2 Bill of Particulars says that they were required to
3 be given written notice and it is admitted that no
4 written notice contained any reference to this injunc-
5 tion that therefore, the erroneous construction --
6

7 THE COURT: I cannot agree with that intrepres-
8 tation of what the Bill of Particulars and the govern-
9 ment counsel said.

10 MR. MINTZ: Well, I think --

11 THE COURT: You see, if I may say so, I gave
12 them written notice of the injunction a long while ago.

13 MR. MINTZ: What Your Honor did was to authorize
14 the F.D.A. and when they elected to do so, to make an
15 inspection --

16 THE COURT: They were under a continuing respon-
17 sibility to obey the injunction and to be uninterrupted
18 by acknowledging --

19 MR. MINTZ: There is no question about that.
20 I'm not questioning that at all. What I am questioning
21 is whether the F.D.A. has exercised the power under
22 Your Honor's injunction in the manner in which they
23 say they were obliged to do to enforce it. They say
24 they must proceed by written notice. The notice which
25 they gave did not mention the injunction.

-66-
Trial Transcript
Motion to Dismiss
Concessions

[9]

On the contrary, its terms excluded certain portions of the injunction.

THE COURT: Well, I must again overrule your motion and deny your motion to dismiss.

MR. MINTZ: Exception.

MR. HYMAN: Your Honor, preliminarily, the last time we were here, that we agreed, there is a stipulation that the defendant, prior to the inspection knew about the injunction in question; is that correct?

MR. MINTZ: No question about it.

MR. HYMAN: And they have copies of the same.

MR. MINTZ: No question about that.

MR. HYMAN: That is the only thing.

MR. MINTZ: I'll concede it on the record before the jury.

THE COURT: That is on the record.

MR. MINTZ: Yes, I know. If he wants a concession before the jury --

MR. HYMAN: One more concession, Your Honor, that is Jesse Rose is the president of Diapulse Corp. and Joseph Rose is the vice-president and treasurer.

MR. MINTZ: That's correct.

THE COURT: Is and was and at all times in question --

Trial Transcript
Concession

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

MR. MINTZ: Yes.

[10]

MR. HYMAN: And the Diapulse Corp. is a Delaware Corporation authorized to do business in the State of New York.

MR. MINTZ: I concede that. I don't see its materiality

MR. HYMAN: Just for the record.

THE COURT: It won't break the case, but there it is. At least it does show it is a corporation.

MR. HYMAN: I will be prepared to prove it. I have copies of the Delaware --

MR. MINTZ: As far as I am concerned my concession holds.

THE COURT: Only because it's true.

MR. MINTZ: If there is any doubt about it I wouldn't make the concession.

(Whereupon the jury selection commenced.)

(Whereupon, a jury of twelve and two alternates were duly impanelled and sworn.)

(Whereupon, a recess was taken.)

(Whereupon, the court resumed.)

(Jury enters box.)

Openings omitted

.....

Trial Transcript
Direct-Kurtzman

[22]

MR. HYMAN: I call Mr. Kurtzman.

MURRAY KURTZMAN, having been called as a witness on behalf of the government, having first been duly sworn by the Clerk of the Court, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. HYMAN:

Q. Mr. Kurtzman, with whom are you employed?

A. I am employed with the United States Food and Drug Administration.

Q. And in what capacity are you presently employed?

A. I am presently employed as a radiation control officer.

Q. And on October 7, 1975, did you have a different job?

A. Yes, I did.

Q. And what was that?

A. Special investigator.

Q. And what were your general duties as investigator with the FDA?

A. My general duties were to inspect premises which manufactured or packed or held food, drugs, cosmetics or devices which were interstate commerce or received in interstate commerce.

Trial Transcript
Direct-Kurtzman

[23]

1 Q. And in that connection were you given an assign-
2 ment some time in early October relating to the Diapulsh Corp.?

3 A. Yes, sir, I was.

4 Q. And who gave you that assignment?

5 A. That assignment was given to me by my supervisor.

6 Q. What was his name?

7 A. His name was Terry Musson.

8 Q. And did you receive written or oral instructions
9 concerning that assignment?

10 A. I received initially written instructions.

11 Q. In what form did you receive these instructions?

12 A. The written instructions were in document form
13 and it was a teletype which was transmitted to our office
14 from headquarters in Rockland, Maryland.

15 MR. HYMAN: Can I have this marked for identifi-
16 cation, a one page document?

17 THE CLERK: Mark for identification as govern-
18 ment's Exhibit "1".

19 Q. I show you government's Exhibit "1" and ask you
20 if you can identify that document?

21 A. Yes, this is the document.

22 Q. And generally, did that document discuss the
23 Diapulsh Corp. of America?

24 A. Yes, it does.

Trial Transcript

Direct-Kurtzman

[24]

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

Q. And did it discuss what you were suppose to do
at the Diapulse Corp.?

A. Yes, it does.

Q. And does it talk about or authorize you to in-
spect --

MR. MINTZ: I object to the contents of the
writing.

CLERK: I think he just asked him whether it is
an instruction that he referred to in his earlier evi-
dence.

MR. HYMAN: That is correct, Your Honor.

THE COURT: Do you wish to offer it in evidence?

MR. HYMAN: Yes, Your Honor.

THE COURT: Please show it to Mr. Mintz.

(Whereupon, Mr. Hyman handed Mr. Mintz the
document.)

MR. MINTZ: May I ask a few questions?

Yes, sure. This is on vior dire?

MR. MINTZ: Yes, Your Honor.

VIOR DIRE

BY MR. MINTZ:

Q. Did you present a copy of this to the Diapulsh
Corp.?

A. No, I did not.

Trial Transcript

Viore Dire-Kurtzman

[25]

1
2 Q. Did you inform any of them of the contents of
3 this document?

4 A. In what fashion, sir, did I read it word for
5 word?

6 Q. Or in substance?

7 A. No, I did not.

8 MR. MINTZ: I object to it.

9 THE COURT: If that is the grounds of your
10 objection, that it was not brought to the notice of
11 the defendant --

12 MR. MINTZ: That is right.

13 THE COURT: Objection is overruled.

14 MR. MINTZ: Exception.

15 CLERK: So marked, government's Exhibit "1" in
16 evidence.

17 DIRECT EXAMINATION

18 BY MR. HITMAN:

19 Q. Now, I refer you to page 3 of government's
20 Exhibit No. 1 in evidence; I ask you to tell the court what
21 those paragraphs, and especially page 3, and the jury relate
22 to?

23 MR. MINTZ: I object, it speaks for itself.

24 THE COURT: Wouldn't it be as well if it is
25 understood to read it to the jury?

Trial Transcript

Direct-Kurtzman

[26]

1
2 MR. HYMAN: Would you please read that teletype
3 to the jury?

4 A. We are interested in determining the location of
5 American Diapulse devices as possible. Since the injunction
6 provides authority to review records that we believe the in-
7 vestigator should use all the diplomacy as possible to try to
8 obtain this information.

9 Shall I go on? "If the person or agent in
10 charge refuses inspection on the basis that the information is
11 not engaged in interstate commerce, the investigator should
12 inform him that the injunction, as well as the Federal Food
13 and Cosmetic Act, authorizes the F.D.A. to inspect to deter-
14 mine the status of the firm.

15 Q. I think that is enough; did you receive those
16 instructions from your supervisor prior to October 7, 1975?

17 A. Yes, I did.

18 Q. And did you read those instructions from your
19 supervisor prior to October 7, 1975?

20 A. Yes.

21 Q. Were those instructions discussed with your
22 supervisor at any time prior to inspection?

23 A. Yes.

24 Q. And when you inspected the premises on October
25 7, did you have another agent with you?

Trial Transcript

Direct-Kurtzman

[27]

- 1
2 A. Yes, I did, sir.
3 Q. And what is his name?
4 A. His name is Harry Bunkley.
5 Q. And were the instructions discussed with M r.
6 Bunkley?
7 A. Yes, they were.
8 Q. So, prior to the alleged inspection you discussed
9 with your co-worker and your superior, the contents of that
10 telegram?
11 A. Yes.
12 Q. And you knew that you were inspecting it pursuant
13 to an injunction; is that correct?
14 A. That's correct.
15 Q. Now, did there come a time, Mr. Kurtzman, that
16 on October 7, 1975, you met Mr. Bunkley?
17 A. That's correct.
18 Q. And who is Mr. Bunkley?
19 A. He is an investigator the same as I was, at the
20 time assigned to the Hicksville resident post.
21 Q. And where did you meet Mr. Bunkley?
22 A. In Hicksville.
23 Q. And about what time was that?
24 A. Approximately 8:00 A.M.
25 Q. And after meeting with your co-worker what if

Trial Transcript
Direct-Kurtzman

[28]

1 anything did you do?

2 A. We proceeded to the premises of the Diapulse
3 Corp.

4 Q. And where is the Diapulse Corp. located?

5 A. 4 Nevada Drive, in New Hyde Park, Lake Success.

6 Q. And have you ever been to that corporation before?

7 A. Prior to October 7?

8 Q. Yes?

9 A. No, sir.

10 Q. Do you know if Mr. Bunkley was ever there?

11 A. Yes, he was.

12 Q. How do you know that?

13 A. From records in our files.

14 Q. What kind of records did you have in your files?

15 A. Reports made by Mr. Bunkley regarding his visits.

16 Q. From those records did you glean from Mr.

17 Bunkley if he was ever let into the Diapulse Corp. on some

18 other occasion?

19 THE COURT: Well, I think we will find that out
20 in some other way.

21 MR. HYMAN: Okay.

22 Q. Now, at what time did you arrive at the
23 Diapulsh Corp.?

24 A. We arrived initially at approximately 9:30 A.M.

Trial Transcript

Direct-Kurtzman

[29]

1
2 Q. And was there any one -- Well, can you describe
3 the building that the Diapulse Corp. is in?

4 A. Yes. It's sort of a -- it's located in what you
5 might call an office industrial complex.

6 I believe it is a two story building and firm,
7 if I recall, is located on the second floor. We proceed up
8 the elevator and entered into the hallway doors.

9 Q. And was there anybody at the corporation when
10 you arrived at 9:30?

11 A. There was one gentleman in an office window.

12 Q. And do you remember his name?

13 A. I believe it's Mr. Solomon.

14 Q. How do you spell that, do you remember?

15 THE WITNESS: I really couldn't say, sir. I
16 have never seen it written out.

17 Q. And did you have a conversation with Mr. Solomon?

18 A. Yes, we did.

19 Q. What was the nature and what if anything did you
20 say to him at that time?

21 A. Well, initially we asked him if Mr. Jesse Ross
22 was president and he told us that Mr. Jesse Ross was out of the
23 country. From the records I had learned there was also a
24 gentleman by the name of Mr. Syler, also associated with the
25 firm and then I next asked if he was president. I was told he

Trial Transcript

Direct-Kurtzman

[36]

1
2 was out as well. He offered that there was a Mr. Joseph Ross
3 that was expected in that day, but unfortunately he had some
4 car trouble and that he would be in late.

5 Q. When he mentioned the name Joseph Ross, did that
6 ring a bell in your mind about if you ever met him before or
7 knew him?

8 A. No, I did not.

9 Q. At that time?

10 A. At that time.

11 Q. What if anything did you decide to do after Mr.
12 Solomon gave you that message?

13 A. Well, it was obviously not clear as to when Mr.
14 Ross's car troubles would be cleared up. So we decided to
15 wait for a while.

16 Q. You're talking about Mr. Joseph Ross?

17 A. Joseph Ross, correct.

18 Q. And at what time, if at any time, did Mr. Joseph
19 Ross arrive?

20 A. Eventually Mr. Ross arrived at approximately
21 10:45 A.M., thereabouts.

22 Q. And did Mr. Ross identify himself to you?

23 A. Yes, he did.

24 Q. And how did he do so?

25 A. By coming up to us and informing us who he was.

Trial Transcript

Direct-Kurtzman

[31]

1
2 Q. Did he identify himself to you as an officer of
3 the corporation?

4 A. Yes.

5 Q. At that time?

6 A. Yes.

7 Q. And what did he say to you?

8 A. He stated that he was the vice-president and
9 treasurer of the firm.

10 Q. And when he identified himself at that time,
11 what if any thing did you do, did you identify yourself?

12 A. Yes, we identified ourselves by showing our
13 credentials and issuing him a written notice of inspection.

14 Q. And do you have a copy of the credentials with
15 you?

16 A. Yes.

17 Q. Would you please take them out?

18 A. Yes.

19 (Witness displaying credentials.)

20 Q. And those are government issued?

21 A. That's correct.

22 Q. By the Food and Drug Administration?

23 A. That's correct.

24 Q. And you identified yourself as an officer of
25 the Food and Drug Administration?

Trial Transcript

Direct-Kurtzman

[22]

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

A. That's correct.

Q. And when he identified himself as Mr. Joseph Ross and after you identified yourself as inspectors, what if anything more did he do at that time?

A. Upon issuing him the written notice we informed him that we were legally obligated to do so.

Q. So, you then and there wrote something out; is that correct?

A. The notice of inspection, yes.

Q. And you presented it to Mr. Ross?

A. That's correct.

Q. At that time what if anything did he say or do, that is Mr. Joseph Ross?

A. About that time he had informed us that he had been the vice-president and treasurer of the firm since its inception and that his duties related to the physical matters and that he was not closely involved with legal matters.

Q. At any time up to this point were you allowed into the plant?

A. No, we were not.

Q. Were you allowed into the inner offices of the company?

A. At no time on this date.

Q. And where did this conversation take place?

Trial Transcript

Direct-Kurtzman

[33]

1
2 A. In what one might call a waiting room, reception
3 area.

4 Q. Did you tell Mr. Ross the purpose of your visit?

5 A. Yes, we did.

6 Q. And what if anything did you tell Mr. Ross was
7 the purpose of your visit?

8 A. We informed him that we wished to inspect the
9 physical premises as well as production and sales records of
10 Diapulsh Corp.

11 Q. Were you more specific, did you ask to see the
12 records concerning machines?

13 A. Yes. We asked to see records concerning
14 machines known as diapulsh. Machines known as P/EMF.

15 Q. And what if anything did Mr. Ross tell you at
16 that point?

17 A. He stated that he would have to defer permission
18 to observe these records until Mr. Jesse Ross was available.

19 Q. And did he tell you when Mr. Ross would return?

20 A. Eventually, yes. We were informed that he would
21 probably be in the following Wednesday, October 15.

22 Q. Now, in addition to inspecting the records con-
23 cerning the diapulsh machine, the EMF --

24 A. P/EMF.

25 Q. That is P/EMF?

-113-
Trial Transcript

Direct-Knutzman

[34]

A. Correct.

C. Did you want to inspect other items?

MR. MINTZ: I object.

THE COURT: What if anything did you say about other items?

MR. HYMAN: Pardon, Your Honor?

THE COURT: What did he say?

MR. HYMAN: What did he say, what did the witness say?

THE COURT: Yes.

C. Did you tell Mr. Ross you wanted to inspect other items at that time or other facilities?

A. Yes, that's correct.

C. And what facilities did you want to inspect at that time?

A. The firm had provided to the Food and Drug Administration, pursuant to the injunction, a list of I believe there were three facilities located I believe, all on Long Island, which were used as warehouses, storage, component storage for Diapulse Corp.

We asked Mr. Joseph Ross if he would have any objection to our inspecting those locations. He told us that these places were not under his firm's control.

C. Did Mr. Joseph Ross admit to you or tell you

Trial Transcript

Direct-Kurtzman

[35]

1
2 anything about the location of Diapulse machines on the
3 premises on that day?

4 A. Yes, he did.

5 Q. What did he say?

6 A. He stated that the Diapulse machines were being
7 manufactured on the premises. But they were being made for
8 sale within New York State and for export.

9 Q. Did he say anything about records concerning
10 Diapulse machines being on the premises?

11 A. He stated that he did have access to these
12 records.

13 Q. Now, at that point did you ask Mr. Ross to
14 produce records concerning the recall of the P/BMT modifica-
15 tion kits?

16 A. Yes, we did.

17 Q. Can you explain to the jury -- did you know
18 what a modification kit was?

19 A. Not in substance, no.

20 Q. Well, when did you first find out about the
21 modification kits?

22 A. By reviewing the injunction. It calls for it
23 in the injunction.

24 Q. So, there is some reference to it in the injunc-
25 tion, a modification kit?

Trial Transcript

Direct-Kurtzman

[36]

1

2

A. That's correct.

3

4

Q. And that's when you first became aware of such
a machine?

5

A. That's correct.

6

7

Q. And did the injunction provide for a recall of
the modification kit --

8

MR. MINTZ: I object to that.

9

10

THE COURT: On the ground the injunction is not
in evidence?

11

MR. MINTZ: Yes, that's one ground.

12

13

MR. HYMAN: Defendant's exhibit "2", by consent
is in evidence, Your Honor, it is a copy of the injunc-
tion.

14

15

CLERK: So marked, government's Exhibit "2"

16

in evidence.

17

18

Q. Now, I show you government's Exhibit "2" in
evidence, the injunction, and ask you prior to the inspection
if you read that document?

19

20

A. Yes.

21

Q. Not the copy but the document?

22

A. Not this particular copy, but the document, yes.

23

24

Q. And did the document talk about a recall pro-
vision?

25

A. Yes.

Trial Transcript

Direct-Kurtzman

[37]

1 Q. Relating to a P/DMF Modification Kit?

2 A. Yes.

3 Q. And did you ask to see the records from Mr. Ross
4 concerning the recall modification kits and concerning the
5 provision?
6

7 A. Yes.

8 MR. MINTZ: I object to this leading, if Your
9 Honor pleases. It's going on a little long.

10 THE COURT: I think it's harmless at this point,
11 Mr. Mintz. Your objection is overruled. But do not
12 lead any further.

13 Q. Did Mr. Ross say anything concerning your re-
14 quest relating to the recall provision of the injunction?

15 A. Yes. He stated that he was not entirely familiar
16 with this particular provision and we'd better discuss it with
17 Mr. Jesse Ross.

18 Q. Was there a recall provision concerning the
19 machines itself in the injunction?

20 A. Yes, there were.

21 Q. And you were familiar with that prior to the
22 inspection, is that correct?

23 A. Yes.

24 Q. And did you discuss with Mr. Ross if any doctors
25 returned any of the machines pursuant to the terms of the

Trial Transcript

Direct-Kurtzman

[38]

1
2 injunction?

3 A. We did discuss this and he informed us that a
4 couple other machines had been returned by doctors. That
5 they were being kept on the premises under lock and key. We
6 then inquired whether there had been any remuneration or
7 restitution of some sort to the doctors and he stated there
8 had not been. They were still at a point in time where they
9 considered it a problem being the doctors.

10 Q. Did you ask Mr. Joseph Ross to see the records
11 concerning the recall provision of the injunction?

12 MR. MINTZ: I object.

13 THE WITNESS: Yes.

14 Q. Did he show you those records --

15 THE COURT: What is that?

16 MR. MINTZ: I object to his leading.

17 THE COURT: Ask him what he then said.

18 Q. Did Mr. Ross show you the records of the company
19 concerning these provisions on the recall?

20 A. No, he did not.

21 Q. Did Mr. Ross show you the records concerning
22 the returned machines from the doctors?

23 A. No, sir.

24 Q. Did you ask to see such records?

25 A. Yes.

Trial Transcript

Direct-Kurtzman

[39]

Q. Now, was there a discussion with Mr. Ross concerning the use of the machine in an investigatory situation?

A. Yes, sir, there was.

Q. And what if anything did you discuss with Mr. Ross concerning the use of the machine for clinical investigation or laboratory investigation?

A. There had been no provision made that the Diapulse machines would be made available for investigatory purposes or for common clinical investigation. There were documents in our file which indicated that 8 machines had been provided to the University of Virginia for such investigational purposes.

We then inquired as to where the origin was, whether they came out of the firm or were provided somehow in another way and would he provide us with any information specifically concerned with those machines.

Q. And did Mr. Ross let you see the records concerning the use of those machines?

A. No.

Q. Did you request to look at those records?

A. Yes.

Q. And the request was denied?

A. It was denied. However, he did provide us with some serial numbers for the 8 serial numbers.

Trial Transcript

Direct-Kurtzman

[40]

1
2 Q. Now, what other things did you ask for, what
3 other things did you ask Mr. Ros --

4 MR. HYMAN: Withdrawn.

5 Q. Did you ask Mr. Ross to produce any other docu-
6 ments concerning any other aspect of the Diapulse Corp.?

7 A. We asked again to see production of sales records
8 going back pertinent to the injunction which had gone into
9 effect July, 1972.

10 Q. Did he produce those records?

11 A. No.

12 Q. Did he give you a reason why he did not produce
13 those records?

14 A. He simply stated that he would -- that this
15 would require Mr. Jesse Ross's decision.

16 Q. Now, did there come a time, during the course
17 of that conversation that you took out a document from your
18 folder?

19 A. Yes.

20 Q. What document did you take out?

21 A. A copy of the injunction.

22 Q. And what did you do, if anything, with a copy of
23 that injunction?

24 A. I turned to the section 5-B and informed Mr.
25 Ross what the actual provision is in section 5-B.

Trial Transcript

Direct-Kurtzman

[41]

1
2 Q Did you read any portion of that section to Mr.
3 Ross?

4 A Yes, I did.

5 Q Would you please pick up government's Exhibit
6 No. 2 and read to the Judge and jury the exact language that
7 you read to Mr. Ross on October 7, slowly?

8 A "The defendant, Diapulse Corporation of America,
9 a corporation, shall:

10 Grant duly authorized officers and employees of
11 the Food and Drug Administration free access to any of its
12 offices, plants, factories, warehouses, storage facilities
13 or other establishments at reasonable times during regular
14 working hours, within reasonable limits and in a reasonable
15 manner to inspect such establishment and all pertinent equip-
16 ment, finished and unfinished materials, containers, and
17 labelling therein; and such inspection may include copying
18 and photographing and shall also extend to all things therein,
19 including records, files, papers, processors and facilities,
20 bearing on whether any prohibited devices have been or are
21 being manufactured, assembled, processed, packed, transported
22 or held in such place.

23 That is the section I read.

24 Q Did you add anything to that concerning Mr.

25 Ross?

Trial Transcript

Direct-Kurtzman

[4-2]

1

2

A Yes.

3

Q What did you say?

4

A I told him that I did not see anything in here

5

which indicated that Mr. Jesse Ross had to be present at the

6

time of inspection.

7

Q When you say in here, you are talking about the

8

injunction?

9

A Yes, that's correct.

10

Q And what if anything did Mr. Ross, Joseph Ross

11

say or do after you read that provision of the injunction to

12

him?

13

A He simply repeated that Mr. Jesse Ross's

14

presence was necessary.

15

Q And did he allow you to inspect the premises

16

of the company?

17

A No.

18

Q What if anything did you do after he did not

19

allow you to inspect the premises?

20

A At that point it seemed fruitless to continue

21

and we got up to leave.

22

Q And did you leave?

23

A Yes.

24

Q And did there come a time when you came back?

25

A Yes.

Trial Transcript

Direct-Kurtzman

[43]

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

Q With the same co-worker?

A Mr. Bunkley, yes.

Q And what day was that?

A October 15.

Q And why did you come back on October 15?

A Mr. Jesse Ross -- Mr. Joseph Ross, I'm sorry,
as we were leaving informed us that Mr. Jesse Ross would
possibly be back on October 15. That it would make more
sense to continue at that time.

Q You didn't come running to the United States
Attorney's office on October 7 to report this alleged violation,
did you?

A No, sir.

Q You went back on the 15th?

A That's correct.

Q What was the purpose of going back on the 15th?

MR. MINTZ: I object to what the purpose was.

THE COURT: No. He may testify if he knows.

A It was the same purpose, to attempt to gain
entrance to permit an inspection of the records of the firm
with Jesse Ross present.

Q Now, on the 15th did you meet your co-worker?

A Yes, I met him approximately 8:00 A.M. or there
abouts.

Trial Transcript

[44]

Direct-Kurtzman

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

THE COURT: Approximately when?

THE WITNESS: 8:20 A.M.

Q Did you go to the Diapulse Corp.?

A Yes.

Q And what time did you get there?

A We arrived about 10:20 A.M.

Q Who was there when you arrived?

A Initially a gentleman who identified himself as
Mr. Jesse Ross greeted us.

Q And who else was there, if anybody, besides Mr.
Jesse Ross?

A Mr. Joseph Ross.

Q And you had met Mr. Joseph Ross on the 7th,
right?

A That's correct.

Q When you met Mr. Joseph Ross on the 7th did you
know him from some other place?

A Yes.

Q Did he know you?

A I don't know.

Q And on what occasion did you see Mr. Joseph
Ross?

A Mr. Joseph Ross and I are, coincidentally, are
members of the same Temple.

BEST COPY AVAILABLE

Trial Transcript

[45]

Direct-Kurtzman

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

Q And you've seen him on those occasions?

A Yes.

Q Did he recognize you?

A I really don't know.

Q Now, on the 15th when you arrived at the
Diapulse Corp., what if anything -- what was the first thing
that Jesse Ross, the president, said to you?

A Well, the first thing was to identify himself.

Q And then what was the second thing?

A He ushered us into a conference room and he
asked whether we would object to the session being tape
recorded.

Q Did you have a tape recorder on you at that
time?

A No.

Q What if anything did you do in reply to Mr.
Ross's request concerning the tape recording?

A This being sort of an unusual situation I
thought that it would be best if I contacted my superiors in
St. Albans.

Q Did you do that?

A Yes.

Q Who did you speak to?

A Mr. Joseph Saline.

Trial Transcript

Direct-Kurtzman

[46]

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

Q Did he give you permission for the session to be recorded?

A Yes.

Q So you weren't hiding anything at that time, is that correct?

A No, sir.

Q What if anything did you ask Mr. Ross on the 15, that is Jesse Ross, relating to the Diapulse Corp.?

A I asked him if he would provide access to the physical premises and to the records.

Q What did he tell you in response to that?

A Mr. Ross stated that his firm was not engaged in manufacturing in interstate commerce and therefore he had nothing to show us.

Q And did he show you anything on the 15th concerning a record of the Diapulse Corp.?

A No.

Q Did you tell him anything about the injunction on the 15th?

A Yes. I told him that we felt that he was in violation of the injunction.

Q Did you issue a notice of inspection on the 15 also?

A Yes.

Trial Transcript

Direct-Kurtzman

Q Why did you do so?

[47]

MR. MINTZ: I object to why.

THE COURT: Overruled.

A We issued him the notice because we felt that we were also under an obligation in terms of the Food and Drug Administration procedures and the injunction as well.

Q Did Mr. Ross tell you on that day something about interpreting the injunction by some one who is going to interpret the injunction?

A Yes.

Q What did he tell you about that?

A He told us that his attorneys were interpreting a specific provision in the injunction which permits export sales, has not been defined as interstate commerce. Export was not interstate commerce.

Q Did he tell you anything about their attorneys interpreting the provision of the Food and Drug law, Title 21?

A No.

Q He told you about interpreting the injunction; is that correct?

A That's correct.

Q The terms of the injunction, is that correct?

A That's correct.

Q Not Title 21 of the Food and Drug Law, is that

Trial Transcript

Direct-Kurtzman

[48]

1
2 correct?

3 A That's correct.

4 Q And all this time your conversation was monitored; is that correct?

6 A That's right.

7 Q Did you ever hear that tape recording since
8 that day?

9 A I never heard it yet.

10 Q You did it that day?

11 A I never heard the recording.

12 Q You never heard the recording?

13 A No.

14 Q Did Mr. Joseph Ross have anything to say on
15 that day concerning the inspection?

16 A Yes. He stated that as far as he was concerned
17 there was just nothing here to inspect. Nothing on the premises to inspect that would be available to us.

19 Q Did they give you advise as to how to get information from them?

21 A Yes. They told us that if the Food and Drug
22 Administration wanted any information that it be put down in
23 writing and this writing would be submitted to their attorneys
24 for consideration.

25 Q Was there anything in the injunction that said

Trial Transcript

[49]

Direct-Kurtzman

that is the way you were going to take information --

MR. MINTZ: I object to that.

THE COURT: Overruled.

A As far as I know there is nothing provided for that.

THE COURT: Well, did they point to anything in the injunction which they interpreted as requiring that?

THE WITNESS: No.

Q Did there come a time, at any time, on the 15 or the 7 that you were let into the company to inspect the premises concerning the terms of the injunction?

A No.

MR. HYMAN: No further questions of this witness.

THE COURT: I guess this is a good time to break for lunch. We will give you an extra five minutes. Come back at 2:15.

Please do not discuss the case with one another or any one not on the jury before it is given to you for your determination.

(Whereupon, the court took a luncheon recess.)

(Continued on next page).

Trial Transcript

Kurzman/Cross

[50]

THE COURT CLERK: Criminal cause for trial, U.S.A. versus Diapulse Corporation.

THE COURT: The Plaintiff's attorney is Cyril Hyman and for the defendant is Copal Mintz. The witness is Murray L. Kurzman.

(Whereupon the Jurors enter the courtroom)

THE COURT: It is now, two twenty and Mr. Joseph Ross isn't here.

MR. MINTZ: I thought I left a paper in the restaurant and he went over to look for it. He doesn't need to be here.

THE COURT: Oh, here he is.

CONTINUED CROSS EXAMINATION

BY MR. MINTZ OF MR. KURZMAN:

Q Mr. Kurzman, on October 7, did you have with you some identification?

A Yes, I did.

Q Will you produce them, please.

THE COURT: Does it happen to be the same one?

THE WITNESS: Yes.

THE COURT: Exactly the same?

THE WITNESS: Yes.

MR. MINTZ: I offer it in evidence.

Trial Transcript

Kurzman/Cross

051

MR. HYMAN: You Honor these are the original documents that he produced. Copies of the document were provided to --

MR. MINTZ: I have no objection to having a photo.

MR. HYMAN: They are part of the Bill of Particulars. This man's identification should not be taken away from him.

MR. MINTZ: I'm not trying to take it away from him.

THE COURT: Let's make a zerox copy.

THE COURT CLERK: Yes, sir.

Now, Defendant's Exhibit A. in evidence.

Q And this is what you showed to Mr. Joseph Ross on October the 7th?

A That's correct.

Q And in addition to that did you hand him any other writing?

A Yes.

Q Do you have a copy of that or the original?

A The original Mr. Ross has. I have a zerox copy.

Q I show you a paper and ask you whether that is the paper that you handed to Mr. Joseph Ross on October the 7th, 1975?

Trial Transcript

Kurzman/Cross

[052]

A That's correct. That is it.

Q And the name?

A BOchney(Phonetic)

Q Signed by Mr. BOchney or by you?

A First his name then by me.

MR. MINTZ: I offer that in evidence.

MR. HYMAN: No objection.

THE COURT CLERK: Defendant's Exhibit B. in evidence.

MR. HYMAN: First signed by Mr. BOchney then by you.

THE COURT: I take it you ought to ask whether the underlining, the underscoring was part of it at the time you presented it to Mr. Joseph Ross.

MR. MINTZ: I understand.

THE COURT: You might as well ask him.

MR. MINTZ: All right. I call your attention to some penciled notations on the margin. Were they on this paper when you delivered it to him?

THE WITNESS: No, they were not.

Q And the underscoring was not on it?

A That was not on it.

Q Was the underscoring there during the time that you were there on October the 7th?

Trial Transcript

Kurzman/ Cross

[053]

A No, it was not.

Q Now, Defendant's Exhibit A merely says that you were-- what does it say; can you tell us , the lower one?

A The lower one is merely an identification. It provides my picture, my signature and when the credential expires. The top one has some writing.

Q The lower one identifies you as an employee of the F.D.A.?

A Basically, yes.

Q The upper one sets forth your authorization?

A Yes.

Q May I read the authorization.

MR. MINTZ: Department of H.D.- withdrawn. Public Health Services: This is to certify that Murray Kurzman was photographed and his signature appears below. He is a duly accredited, trained agent, specifically authorized to have access to and keep ^{all} ~~copy~~ and verify any reports and records, ^{and} ~~and~~ Under requirements: 505 requirements or judgement or 507 D or G of the Federal Food, and Drug and respective Act as mentioned, ^{and} ~~and~~ it is authorized to administer oaths and affirmation and to act within the Commissioner with the performance in the law and department regulation

Trial Transcript

[054]

Kurzman/Cross

administrative by the Food and Drug Administration.

Q Now, is there anything on these credentials which refers to the juncture?

THE COURT: The document speaks for itself. Now, that's the form Two Hundred C?

THE WITNESS: That's correct, your Honor.

THE COURT: Did you exhibit Two Hundred B. to him?

THE WITNESS: I believe Two Hundred B. is another authorization for other investigators. Two hundred A is, I believe, the one with the picture that all investigators--

MR. MINTZ: May I read Defendant's Exhibit B to the Jurors.

THE COURT: Let's make a dozen copies or more and give it to them. Go ahead.

MR. MINTZ: I won't read it all. This reads as follows: The name entitled is Joseph Ross, Department of Health, Education and Welfare, Public Health Service Food and Drug Administration. Name entitled and of individual Joseph Ross, Vice President and Treasurer. October 7, 1975, Diapulse Corp. of America, 1045 Ford Nevada Street, New Hyde Park. Post Office and so forth. Notice of Inspection is

Trial Transcript

[055]

Kurzman/ Cross

hereby given pursuant to section 704A of the F.D.A. Administration 21, U.S. C now 704 A and or part F in the part of Services, 42USC 263 and 364. There are the signatures, then 704 of the F.D.A and 21 USC 374 are quoted below. 704A for purposes of enforcement of this act, officers or employers duly distinguished by the secretary, upon presenting and appropriate credentials and a written notice to the owner, operator or agent in charge or authorized one to enter at reasonable time any factory, warehouse or establishment in which food, drugs, devices or cosmetics or manufacture, processed, packed or held for introduction into interstate commerce or after such introduction to enter any vehicle being used to transport such food, drug, device or cosmetic in interstate commerce and two, to inspect at reasonable time and within reasonable limits and reasonable manner such factory, warehouse, establishment or vehicle and all equipment finished and unfinished material contained in and labeled therein.

Q How long, withdrawn. How much time did you spend at the premises of Diapulse in October the 7th after Mr. Joseph Ross arrived?

Trial Transcript

KURZMAN/ CROSS

[056]

A Perhaps a half and hour.

Q Did you have an recording device with you?

A No, sir.

Q What equipment, if any, did you have with you?

A Just my briefcase and some papers.

Q What was in the brief case?

A Copies of injunctions, booklets containing notices of inspections, road maps; that's all paraphernalia.

Q No camera?

A No camera.

Q I believe you testified that at one point or another during that half hour you read to Mr. Ross a portion the injunction?

A That's correct.

THE COURT: A what?

MR. MINTZ: A portion of the injunction.

Q Did you, at that time while reading, have a complete copy of the injunction?

A Yes, I did have.

Q Do you have it with you now, what you did at that time?

A No, sir, I don't.

Q Did your companion have any equipment with him?

Kurzman/ Cross

[057]
~~11210~~

A The same equipment that I would have had that I just mentioned.

Q Nothing else?

A No, sir.

Q Mr. Joseph Ross was polite?

A Yes.

Q He answered your questions?

A Yes.

Q You referred to some machine that have been sent out for investigatory purposes?

A That's correct.

Q Did you know on October 7, 1975 that those machines were still in the possession of the University of Virginia?

A No, sir.

Q Had you been given any information on that?

A That they may be at the University of Virginia?

A Yes.

A No, sir.

Q Did Mr. Ross tell you that they were in the University of Virginia?

A No.

Q What did he say?

Kurzman/ Cross

A Well, he told me that they've been taken out of stock and he provided the serial numbers on them. That's about it.

Q Didn't he tell you also that those were sent with the permission of the F.D.A.?

A Yes.

Q And that full reports had been made on them to the F.D.A.?

A What sort of reports?

Q I'm asking what he told you.

A There was nothing mentioned about reports being made.

Q Did you ask him where the machines were at that time?

A No.

Q You don't know whether they were on the premise or not; whether they were in the premise?

A My information was that they've been sent to the University. I don't know that. I had no further information.

Q You had no information that that had been returned?

A No, sir.

Q Now, on October 15, did you again exhibit your

Trial Transcript

Kurzman/Cross

[059]

credentials that are in evidence; Defendant's Exhibit A?

A Yes.

Q And did you hand him any papers?

A I-- We issued a second notice of inspection to Mr. Jesse Ross this time.

Q And the same form and consent as Defendant's Exhibit B?

THE COURT: Except as to the date I assume.

MR. MINTZ: Yes.

Q They were identical?

A This time Mr. Jesse Ross's name appeared on the top.

Q I show you one of the documents which are addressed to Mr. Jesse M.M.I. Ross and ask you if that's the document?

A Yes, sir, it is.

MR. MINTZ: I don't think it's necessary to offer it into evidence. I'll make-- offer it into evidence.

THE COURT: Why not make it Defendant's Exhibit B1.

THE COURT CLERK: Defendant's Exhibit B1 in evidence.

Q On that date, October 15th, did you have any

Trial Transcript

Kurzman/ Cross

[060]

equipment with you other than what you previously described?

A The same equipment.

Q And your co-worker?

A The same thing.

Q How much time did you spend on that engagement?

A I believe it was in the order of twenty minutes. Well, from the time we entered to the time we actually left was twenty minutes. Notice ten minutes during the course of time.

Q Was Mr. Jess Ross there throughout that period?

A Yes, he was.

Q And Mr. Joseph Ross was there throughout that period?

A Initially Mr. Jesse Ross introduced himself to us when we were ushered into the conference room and Mr. Jesse Ross began reading our credentials into the tape recording. At about that time Mr. Joseph Ross entered the room and remained throughout the course.

Q And the recording was made in your presence?

A That's correct.

MR. MINTZ: I would like to present the recording, if your honor please.

Kurzman/ Cross

[061]

MR. HYMAN: Objection.

THE COURT: Out loud or?

MR. MINTZ: Yes.

MR. HYMAN: This man didn't make the recording.

If they want him to bring the recording let the man who made the recording get on the stand and do it. I think this is not the proper way. He was just a party to the recording. He doesn't know if it was documented.

THE COURT: We can excuse the Jury by his presence. Then he can tell whether it's a reasonable fair representation of what was said in his presence by himself and others on the occasion of this meeting.

Excuse the Jury and conduct this and see whether it is or not.

Do not discuss this case amongst yourselves or anybody else until the case is given to you.

I'm thinking about audibility. Why don't we have someone sit fourteen feet and someone in the 7th seat. Put it in the play of the maximum audibility. (the tape is now playing)

VOICE: The date is the 15th of October, 1975. I have before me two gentlemen from the F.D.A.

Kurzman/Cross

[062]

The name is; what is your name?

MR. KURZMAN: Murray Kurzman K U R Z M A N.

VOICE: What is your name?

MR. BAUKNEY: Harry Baukney.

VOICE: B A U H N E Y?

MR. BAUKNEY: No, B A U K N E Y.

VOICE: Harry Baukney?

MR. BAUKNEY: Correct.

VOICE: For the record I want to indicate-- You have no objection to our recording this conversation so that we'll have an accurate recording of what is said.

VOICE: Before I can make that statement I think perhaps I better check with my office.

VOICE: All right. If you will take the telephone over there, I'll be very happy to let you call your office.

VOICE: Okay.

VOICE: For the record you made a telephone call to your office.

VOICE: That's correct.

VOICE: And what was their answer?

VOICE: That we may proceed, proceed so that we may go ahead .

VOICE: So that we may go ahead and record what took place.

VOICE: We showed you our credentials Mr. Ross. We have a notice of inspection-- for the record can we have the correct spelling of your name, Jess and Ro- double S, is that correct?

VOICE: That is right.

VOICE: Do you have a middle initial?

VOICE: M. I.

VOICE: We are presenting you as required by law, with a Notice of Inspection. It has our name as well as yours and the time, 10:30 a.m., also Mr. Joseph Ross, Vice President (Inaudibility)

VOICE: Shall I proceed?

VOICE: Yep.

VOICE: Okay. As to the duly authorized representative subject to the F.D.A., we herein request, at this time, that you sign to make an inspection of the premises, records and production of The Diapulse Corporation of America.

VOICE: So, you know from the statement made in your Inspection Notice here-- I'd like to read it for the record. " You're allowed to make an inspection at reasonable times, any factory, warehouse or establish-

in which food and drug devices or cosmetics are
manufactured, processed, packed or held for intro-
duction into Interstate Commerce. At the present
time we're not manufacturing or selling or introdu-
cing anything into Interstate Commerce. So, there-
fore, we have nothing to show you. [064]

VOICE: We are prepared, in this case, to
advise you that it is our feeling that this refusal
of yours is a violation of the Food, Drug and Medica-
tion Act as well as the terms of the injunction.

VOICE: I'm requesting you to state how and
why?

VOICE: This is what we've been instructed to
tell you. We are not prepared or in a position,
personally, to advise you. We are not in a position
to interpret the law or definition of the Interstate
Commerce.

VOICE: As a matter of fact, I believe that we
are not refusing. We are answering your questions.
We are simply telling you that we had (Inaudibility)
for Interstate Commerce. We are not refusing you an
inspection. We are not refusing you anything. We have
nothing to show you.

VOICE: As I understand it at the time of the
injunction reflects backwards as well as to the pre-

Trial Transcript
Kurzman/ Cross

[065]

sent.

VOICE: Well, according to the interpretation of your attorney, they differ with you. So therefore, let me follow the direction of your attorney. And I would suggest, strongly suggest to you that any request or any questions which you wish to answer be submitted to us in writing so that we can submit it to our attorney and he will direct us whether or answer or not to answer any questions.

VOICE: Very well, since you-- we have that understanding that you are refusing inspection at the current time--

VOICE: We're not refusing inspection. You keep on saying that. It's not correct. You are asking us to show you our records concerning Interstate Commerce or anything we may export for Interstate Commerce. We say we don't have anything for Interstate Commerce.

VOICE: If that's the case then obviously there's nothing further to be gained by any further discussion and we are prepared to leave now.

VOICE: Okay.

VOICE: Thank you.

VOICE: Okay thank you. End of Tape.

Trial Transcript
Kurzman/Cross

[066]

MR. HYMAN: I have no objection, your Honor, to the tape recording.

THE COURT: If you can find out where it begins now.

MR. MINTZ: There seems to be two voices, Mr. Jess Ross and Joseph Ross.

THE COURT: You can identify your own voice.

THE WITNESS: Yes.

THE COURT: Did Mr. Baukney speak at all?

THE WITNESS: Yes.

THE COURT: I thought I heard two Government voices.

MR. MINTZ: There's also two defendant's voices.

MR. HYMAN: Yes.

THE COURT: Are you sure it's back at point one?

Q Well, you say this is an accurate recording of what transpired?

A Yes.

THE COURT: What did you want to inquire? Let me take this tape recording and ask you at the end of it whether or not that's what occurred in your presence and can you identify how many speakers there were all told and who spoke.

Trial Transcript
Kurzman/Cross

MR. MINTZ: Do you want to have Jess Ross act as engineer in charge; with your honor's permission.

THE COURT: First, ask the questions.

(The jury re-enters the courtroom)

Q Mr. Kurzman, you have heard recorded or repeated the recording that we're about to offer in evidence; is that an accurate recording of what transpired?

A Yes, it is.

MR. MINTZ: I offer it in evidence and ask that it be played.

THE COURT: Well, the best way to offer into evidence; it hasn't been transcribed I take it?

MR. MINTZ: Except by the Stenographer.

THE COURT: You have not prepared a transcript? I'm not so sure that it's absolutely correct. You may show that, if you will, why not give it to Mr. Hyman so that he can follow this and perhaps that might be-- if the transcript is satisfactory. The tape, the cassette will be received in evidence.

THE COURT CLERK: Defendant's Exhibit C in Evidence.

(The tape is being played again)

VOICE: The date is 15th of October, 1975.

I have before me two gentlemen from the F.D.A.

The name is; what is your name?

MR. KURZMAN: Murray Kurzman K U R Z M A N

VOICE: What is your name?

MR. BAUKNEY: Harry Baukney.

VOICE: B A U H N E Y?

MR. BAUKNEY: No, B A U K N E Y.

VOICE: Harry Baukney?

MR. BAUKNEY: Correct.

VOICE: For the record, I want to indicate--
You have no objection to our recording this conversation so that we'll have an accurate recording of what is said.

VOICE: Before I can make that statement I think perhaps I better check with my office.

VOICE: All right. If you will take the telephone over there, I'll be very happy to let you call your office.

VOICE: Okay.

VOICE: For the record you made a telephone call to your office?

VOICE: That's correct.

VOICE: And what was their answer?

VOICE: That we may proceed, proceed so that we may go ahead.

VOICE: So that we may go ahead and record what took place.

VOICE: We showed you our credentials, Mr. Ross. We have a Notice of Inspection-- for the record can we have the correct spelling of your name, Jess and Ro- double S; is that correct?

VOICE: That is right.

VOICE: Do you have a middle initial?

VOICE: M.I.

VOICE: We are presenting you as required by law, with a Notice of Inspection. It has our name as well as yours and the time, 10:30 a.m., also Mr. Joseph Ross, Vice President (Inaudibility)

VOICE: Shall I proceed?

VOICE: Yep.

VOICE: Okay. As to the duly authorized representative subject to the F.D.A., we herein request, at this time, that you sign to make an inspection of the premises, records and production of the Diapulse Corporation of America.

VOICE: So, you know from the statement made in your Inspection Notice here-- I'd like to read it for the record. "You're allowed to make an inspection at reasonable times, any factory, warehouse or establish-

Trial Transcript
Kurzman/Cross

[070]

ment in which food and drug devices or cosmetics are manufactured, processed, packed or held for introduction into Interstate Commerce. At the present time we're not manufacturing or selling or introducing anything into Interstate Commerce. So, therefore, we have nothing to show you.

VOICE: We are prepared, in this case, to advise you that it is our feeling that this refusal of yours is a violation of the Food, Drug and Medication Act as well as the terms of the injunction.

VOICE: I'm requesting you to state how and why?

VOICE: This is what we've been instructed to tell you. We are not prepared or in a position, personally, to advise you. We are not in a position to interpret the law or definition of the Interstate Commerce.

VOICE: As a matter of fact, I believe that we are not refusing. We are answering your questions. We are simply telling you that we had (Inaudibility) for Interstate Commerce. We are not refusing you an inspection. We are not refusing you anything. We have nothing to show you.

VOICE: As I understand it, at the time of the injunction reflects backwards as well as to the pres-

ent.

VOICE: Well, according to the interpretation of our attorney, they differ with you. So, therefore, let me follow the direction of our attorney. And I would suggest, strongly suggest to you that any request or any questions which you wish to answer be submitted to us in writing so that we can submit it to our attorney and he will direct us whether to answer or not to answer any questions.

VOICE: Very well, since you-- we have that understanding that you are refusing inspection at the current time--

VOICE: We're not refusing inspection. You keep on saying that. It's not correct. You are asking us to show you our records concerning Interstate Commerce or anything we may export for Interstate Commerce. We say we don't have anything for Interstate Commerce.

VOICE: If that's the case then obviously there's nothing further to be gained by any further discussion and we are prepared to leave now.

VOICE: Okay.

VOICE: Thank you.

VOICE: Okay thank you. End of Tape.

Q Mr. Kurzman, is that an accurate recording of what transpired on October the 15th, in your presence?

A Yes, sir.

Q Did you report the substance of that to your superior?

A Yes sir, we did.

Q Did you, at any time, ask to take further action?

A No, sir.

Q They did not take any further action as far as Diapulse was concerned?

A That's correct.

MR. MINTZ: No further questions. Your Honor just to note there are four voices.

THE COURT: Yes, you can ask the witness.

Q How many voices were there in that recording?

A Four.

Q Whose were they?

A Myself, Investigator Baukney and Mr. Ross, Jesse and Joseph Ross.

Q Whatever appeared there; whatever is recorded there on behalf of R.D.A. was either your voice or your associate's voice?

A That's correct.

BEST COPY AVAILABLE

Trial Transcript
Kurzman/Cross

[073]

Q Everything was by Mr. Joseph Ross or Jess Ross in the presence before you?

A That's correct.

MR. MINTZ: No further questions.

I like to have this marked as an evidentiary transcript of the tape. It's satisfactory to the Government that in substance.

MR. HYMAN: I have no objection. Obviously if there was any discrepancy the recording will have to prevail over what ever appears.

THE COURT: Unless you gentlemen agree that this is a faithful transcript. But, in the absence of any such agreement what was on the tape would solely be determined by what you heard or anybody heard on the replay and not the transcript. The parties agree that the transcript is faithful transcript of what's on the tape then we obviously make it a little easier for you to deal with.

THE COURT CLERK: This is Defendant's Exhibit C -- Government's Exhibit 3 in evidence.

RE DIRECT EXAMINATION

BY MR. HYMAN:

Q Now, sir, on October 15th as verified by the tape recording which would be a verbatim transcript of what

occurred and not a report. Isn't it a fact, sir, that you talked about the injunction in question on two occasions?

A That's correct.

Q And you used the word injunction, is that correct?

A That's correct.

Q You also used the word Food and Drug Law, is that correct?

A That's correct.

Q What did you say; can you read to the jury that phrase that you told Mr. Ross; your authority for being there.

A We were prepared in that case to advise you that it is our feeling that this refusal of yours is in violation of the Food, Drug and Cosmetics as well as the terms of the injunction.

Q As well as the terms of the injunction; is that what you told Mr. Ross?

A That is it.

MR. HYMAN: I have no further questions of this witness.

Except that, your Honor, prior to his being cross examined and prior to his testimony, I handed

over to Mr. Mintz Thirty-five hundred material which he did not mark. In order to preserve the record on appeal or future date I'd like to have it marked.

I have no further questions.

RE-CROSS EXAMINATION

BY MR. MINTZ:

Q Did you have in your possession a copy of the injunction on the 15th of October?

A Yes.

Q You didn't take it out?

A No.

MR. MINTZ: Nothing further, your Honor.

THE COURT: You're excused, sir.

(Whereupon the witness is excused.)

H A R R Y R. B A U K N E Y, having been duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. HYMAN:

Q For whom do you work, sir?

A I work for the F.D.A.

Q In what capacity?

A I'm an inspector ~~and~~ a Consumer Safety Officer.

Q And on October 15th, 1975, were with

Mr. Kurzman?

A Yes, I was.

Q And were you the co-inspector of the Diapulse Plant on the 15th of October?

A That's correct.

Q And also on October 7th?

A Yes, sir.

Q And were you sitting in court this morning when your co-inspector testified on the stand?

A Yes, I was.

Q Did you hear the questions I asked him and the answers?

A I did.

Q And if I was to ask you the same questions would you give us substantially the same answers as your co-worker?

MR. MINTZ: Objection.

THE COURT: The objection must be sustained. The question is multiple in form.

Q Did you hear the answers-- okay I'll withdraw that series of questions and we'll come back to it again. Did you attempt-- were you given instructions sometime in July of 1967--75 ?

A Yes.

Q To do something with the Diapulse Corporation?

A Yes, I was.

MR. MINTZ: I object.

THE COURT: No, I think it is not in the charge but if it refers to the episode it has still and evidentiary place in the record.

MR. MINTZ: That was threemonths before.

THE COURT: Yes.

MR. MINTZ: And it seems to me it's bringing in
e evidence on a charge which your Honor dismissed.

THE COURT: No question about that. There is no charge for this jury except with respect to October 7th and one with respect to October the 15th. On the question of mental approach and attitude it has and evidentiary place for the jury might so conclude.

MR. MINTZ: I respectfully except.

MR. HYMAN: Mark ffor identification a copy of telegram.

THE COURT CLERK: Mark for identification as Plaintiff's Exhibit four.

Q Sir, I show you a teletype, Government's Exhibit four for identification and ask you if you can identify that document?

A Yes, I can.

Q And what is that document?

A It is an assignment teletype from
Washington instructing us to conduct--

MR. MINTZ: Objection to the --

THE COURT: He's just describing the character
of the assignment.

1 A It's an assignment teletype.

Q Did you receive that teletype?

A Yes, I did.

Q And was that assignment assigned to you?

A Yes, it was.

Q On what date did you receive that assignment?

A I received it on or about July the
Second.

MR. HYMAN: I offer it into evidence.

MR. MINTZ: I object.

THE COURT: Well, you have to look at it first.

MR. MINTZ: I'm familiar with it, your Honor.

THE COURT: May I see it.

MR. MINTZ: Your Honor, I assume that was in the
Bill of Particulars, now I am informed to the contrary.

THE COURT: I don't think so. The text of it
was unfamiliar to me.

MR. MINTZ: May I have time to read it?

THE COURT: It is in the Bill of Particulars.

MR. HYMAN: It was in the Bill of Particulars.

THE COURT: It's the first of the two.

MR. MINTEZ: It's dated June 18th. I was misled
of the date specified by the witness.

THE COURT CLERK: Government's Exhibit four in
evidence.

Q Now, sir, prior to-- Did you make an attempted
inspection of Dispulse Corporation in July?

A Yes, I did.

Q And prior to that attempted inspection you re-
ceived instruction from the F.D.A.?

A Yes, we did.

Q I ask you to read to the Jury and to the Court
the instructions starting with Paragraph Five D Two; can
you read it or do you want a printed copy?

1 THE COURT: The Bill of Particulars might be
easier to read.

A Shall I read that paper?

Q No, from here(Indicating) right to the end.

MR. MINTEZ: If the Court please, this is over
my objection I take it. I objected to the reception
of it.

THE COURT: The objection was overruled. It was
received.

Trial Transcript
Baukney/Direct

[080]

MR. MINTZ: I just wanted to make that clear.

A Paragraph 5D2 of the above injunction requires and accounting of all EMF devices and kits

including those not returned. So far as we are aware no such accounting has been provided. All time/^{frame}specified in the permanent injunction have know been-- I'm sorry I can not read the next few words.

Q Therefore failure--

A Failure to comply puts them in violation of the injunction. If we can establish that they are in violation of permanent injunction then we will be prepared to go before the court and seek redress. (B) MDEF questions the investigator assigned to make the inspection to familiarize them with the case and feel free to contact BMDEF, Michael Madlock(Phonetic) 301-443-6686 or Dan Beardly(Phonetic) 401-443-4032. If any problems are encountered during the inspection the permanent injunction signed by Judge Dooling on July 18, 1974, remains in full effect following affirmation of the court by the court of appeals pursuant to section 5B of the injunction. The F.D.A. is authorized free access to inspect the defendant's offices, plants, factory, warehouse, storage facility or other establishments and to inspect all permanent equip-

Trial Transcript
Baukney/Direct

[081]

ment finished and unfinished material containers and labelers. Page Three, there includes copies and extended to all things, including records, files, papers, processes and facilities bearing on whether any prohibited devices have been or are being manufactured, assembled, processed, packed or transported. In addition to the copies and notices of the injunction which Diapulse was obligated to sent out. Section FourD one of the permanent injunctions required the Diapulse Corporation of America by October 18th, 1974, to cause to prohibit devices of Section 2E2-paragraph(3/EMF a modification kit). It further states those prohibitable to be returned to their headquarters or other suitable facilities as provided by the Food and Drug Administration. To date the Diapulse Corporation of America has not requested F.D.A. approval for any other suitable facilities. Therefore, we assume all EMF modification and label should have been sent to the firm headquarters at New Hyde Park, New York. We believe that the district should take all steps necessary to enforce paragraph 5B of the injunction to obtain total accountability on shipment and return under this recall. We are provided copies of all materials received by BMDEF on this recall. The 180 days required under the permanent injunction for the firm to have made a final decision as to whether

they were going to destroy or salvage the returned devices has now passed and the -- shall I go on?

Q Yes.

A of your inspection will have a definite impact of further actions as indicated in this matter, in response to Nicto (Phonetic) R and R 282675, we are now assigning the recall number to the action undertaken by the firm Mr. Patterson of GCF. One agrees that reference to a recall be deleted.

Q Now, sir--

MR. MINTZ: Just a moment. I move to strike out everything - every assertion that this witness has read from that paper alleging any failure to comply with the injunction. There is no proof of that what soever. This witness doesn't know anything about it. Here we have a series of allegations of provisions that have not been complied with.

THE COURT: None of it is a question of whether it should be or should not be stricken out. We are concerned in this case solely and only with the question of whether or not the inspections allegedly requested on October 7 and October 15th were or were not refused. That's all we are concerned with. If the Government is going to show that the inspection

requested were authorized inspections. In other words, that it wasn't some idea as, "I'll run out and take a look," but that they were authorized. This is received in evidence, solely and only to show that there was an assignment authorizing-- sent from Washington and later assigned to Mr. Baukney and I take it in the second instance to Mr. Kurzman and Mr. Baukney. Now, the other material in here, the recitation of what the F.D.A. believes, the compliance and non-compliance with the provision of the injunction is beside the point, utterly beside the point.

If you wish, you can file it in the back of your mind. It wasn't pursuant less they note that they have a notation for it and they were in there seeking and inspection for the reason. That's all that was done for the reason.

Q Now sir, did you comply with the instructions that you received in that telegram?

MR. MINTZ: I object to that.

Q Did you look at the records of Diapulse Company?

A I myself? Yes, we reviewed the file and in the office and we went through a copy of the injunction which was also in the file.

Q And did there come a time on July 2nd, 1975

Trial Transcript
Baukney/Direct

[684]

that you attempted and inspection of Diapulse Company?

A Yes.

MR. MINTZ: I Object to that.

THE COURT: What date did you say? Can you ask the question again.

MR. MINTZ: Objection.

Q Did there come a time in July of 1975 that you attempted and inspection of Diapulse?

THE COURT: No, did you go?

THE WITNESS: On July 2nd we went to the Diapulse Corporation.

Q And who accompanied you at that time?

A Investigator Fred Lasar (Phonetic)

Q That's the investigator who just testified.

A No, it is not. That's somebody else.

Q That's somebody else, is that right?

A Yes, sir.

Q And on July 2nd did you go to the Diapulse Corporation?

A Yes, we did.

Q And who spoke to you from the Diapule Corporation?

MR. MINTZ: I object to any further reference of July Second.

Trial Transcript
Baukney/Direct

[085]

THE COURT: Overruled for the reason already assigned; for the reason earlier assigned.

A We spoke with Mr. Jesse Ross.

Q And did you issue a Notice of Inspection on July 2nd?

A Yes, we did.

Q And did you tell Mr. Ross anything else besides the Notice of Inspection?

A We told Mr. Ross that we were there to inspect the premises under the provisions of the injunction.

Q Did you read him the Notice of the Provision of the Injunction on July 2nd?

A No, we did not.

Q You specifically told him you were there pursuant to the terms of the injunction?

A Yes, I did.

Q And what if anything did he say to you about that?

A He said that he was not going to permit an inspection.

Q Now there came a time-- did you leave the premises on July 2nd?

A Yes.

BEST COPY AVAILABLE

Trial Transcript
~~Backney~~/Direct

[086]

Q And did there come a time when you went back to Diapulse Corporation on another occasion?

A Yes.

Q What occasion was that?

A We went back to the Diapulse Corporation on October 7th.

Q And what agent accompanied you on that day?

A Investigator Kurzman and myself.

Q And was there an officer of the corporation there on October 7th when you visited the Diapulse Corporation?

A Yes, there was. It was Mr. Joseph R. Ross.

Q And on that occasion did you issue another notice of Inspection?

A Yes, we did.

Q And on that occasion did your co-inspector read from some document?

A Yes, he did.

Q What document was read?

A He read from the Injunction Decree.

Q And did you hear him read from the Injunction Decree this morning?

A Yes, I did.

Q Was that the sum and substance, the record he

BEST COPY AVAILABLE

Trial Transcript
Baukney/Direct

[087]

used on October 7th?

A Yes, sir.

Q And what if anything did Mr. Ross, Joseph Ross respond when he was reading the injunction decree or provision, 5B of the injunction decree, having to do with inspection?

A I don't recall what he said.

Q Now, did there come a time that on October 15th you again visited the Diapulse Corporation?

A Yes, again with Investigator Kurzman.

Q Did you issue a Notice of Inspection again?

A1 Yes.

Q And on that occasion Mr. Jesse Ross taped the interview; is that correct?

A Yes, he did.

Q Did you hear the tape interview in court before?

A Yes.

Q Is that substantially what happened at that point?

A Yes.

Q Was Mr. Jess Ross advised that there would be violation of the terms of the injunction?

MR. MINTZ: I object to that as leading,
your Honor.

Trial Transcript
Baukney/Direct

[188]

THE COURT: Well, is that the portion that is on the tape.

MR. HYMAN: May I have Exhibit three please?

Q I show you Government's Exhibit Three in evidence and ask you to read a transcript where it says F.D.A., this paper over here.

A We were prepared in that case to advise you that it is our feeling that this refusal is a violation of the Food, Drugs and Cosmetic Act as well as the terms of the Injunction.

Q Was that statement made at that meeting?

A Yes, sir.

Q Did you hear it?

A Yes, sir.

Q Is that a correct transcript of the conversation?

A I believe it is. Yes, sir.

MR. HYMAN: No further questions.

CROSS EXAMINATION

BY MR. MINTZ:

Q What responses were made to that statement?

A Jesse said that he's questioning to state how and why.

Q And what was the response to that?

A Our response was that we were not authorize to discuss this type of thing.

Q Now, on July the 2nd did you exhibit any credentials?

A Yes, sir, I did.

Q Do you have the credentials which you exhibited?

A Yes, sir, I do.

Q Please let me see them.

MR. MINTZ: I offer into evidence the credentials exhibited to me.

THE COURT: It's acceptable to me.

MR. HYMAN: Pursuant to the court order, the photostats were made pursuant to the court order. It's a violation of--

THE COURT: For obvious reasons one is not allowed to counterfeit one of these (Indicating) the statue says or make any copy of it. Well, it's pretty awkward at the moment. So, it must be clearly understood that we are not counterfitting. We are making a copy for court purposes.

THE COURT CLERK: Now, Defendant's Exhibit D in evidence.

MR. MINTZ: I will enter and stipulate, if Mr. Hyman agrees, that these are exactly the same

form as exhibited.

MR. HYMAN: I'll have to look at it.

THE COURT: I take it that would be a 200 C and 200A; is that right?

MR. HYMAN: It is so stipulated; if your honor please, except for the name and date.

Q Did you show any notices on July the 2nd? Did you issue any notices?

A Yes, notices of inspection.

Q You don't have a copy of it with you?

A I believe I have a copy of it.

Q Will you produce it, please.

(Whereupon the witness complies)

Q I show you what purports to be a copy and ask you if this is the carbon copy?

A Yes, this is a carbon copy of the original that we issued and gave to Mr. Jess Ross.

Q And does your handwriting appear on this?

A Yes, sir.

Q What is in your handwriting?

A Everything is in my handwriting except the signature of the other investigator who was there.

Q And his name is?

A Fred J. Marsarof (Phonetic)

MR. MINTZ: I offer it in evidence.

MR. HYMAN: No objection.

THE COURT: Received.

THE COURT CLERK: Defendant's Exhibit E. in evidence.

MR. MINTZ: Is it conceded that it's identical in form with Exhibit A, I believe.

THE COURT: Identical with Exhibit B and B1

MR. HYMAN: Yes, your Honor, except for the dating and the handwriting portion.

MR. MINTZ: The printed portion is identical.

MR. HYMAN: Absolutely.

Q Now, how much time did you spend with the Diapulse premises on July the 2nd ?

A Approximately twenty-five minutes from the time we issued the notice.

Q And your companion was with you during the entire time?

A Yes, he was.

Q Will you tell us what you recall as what took place on that occasion?

1 A We entered the premises at approximately One p.m. and we came into a small reception area which was unoccupied. We saw two female employees working in

the office space just behind the reception area. When one of them came forward-- when they saw us one of them came forward and we identified ourselves and showed her our credentials and we asked to speak to the individual in charge. She attempted to take our credentials to show presumably the individual in charge who we were. I told her it was procedure not to release the credentials. She then left and presently a gentleman, who later identified himself as Mr. Jess Ross, came into the office area. He then came forward and we showed him our credentials. We issued a Notice of Inspection to him and he identified himself as Mr. Ross.

Q Well, what else?

A We told him that the purpose of our visit was to conduct an inspection and review records under the provision of the injunction. He asked what records and we told him that we would be more precise when we were completed with the Notice of Inspection. At this time he stated that he would not permit inspection. He said that he has not be distributing any Diapulse devices in Interstate Commerce since the time of the injunction and he has not manufactured anything for the domestic market. Continue?

Q Yes, please.

A I told him that the purpose of our visit was to make an inspection of the premises and to review records to determine that what he said was the case. He said that his-- an attorney was interpreting the injunction decree to mean that inspection would be permitted only if the firm was distributing the devices in Interstate Commerce.

Q What did you say?

A I didn't respond to that point.

Q Anything else?

A He stated that if we wanted answers to our questions we should submit them in writing to his attorney and that his attorney would respond to F.D.A. I said that it wasn't our practice to submit questions in writing when we made an inspection. Since it appeared that he was not going to permit entry into the premises and he wouldn't answer any further questions we rose and left the premises. The time was about one thirty-five.

Q Did you read to him any portions of the injunction?

A No, sir, we didn't.

Q Did you have a copy of it with you?

A With me, no. I read it prior to leaving the office.

Trial Transcript
Baukney/Cross

Q Did you have any equipment with you?

A No, sir.

Q Now, coming to October 7th. I believe I heard you say that you don't recall what transpired on that occasion; is that what you had answered?

THE COURT: What?

MR. MINTZ: I believe he said he did not recall what transpired on October the 7th.

THE COURT: As to some questions he so answered. Not as to the whole episode.

Q What do you recall of October 7th?

A Well, I recall that we contacted Mr. Joseph Ross.

THE COURT: At that time and that he what it boiled down to was he deferred the inspection until which time Mr. Jess Ross would be present.

Q Did you make any comments on that day?

A I don't think so. I don't believe I did without consulting my notes.

Q Do you have notes to consult?

A I have notes with me, yes.

Q Will you please consult. Tell me whether you made any statements to that last statement by Mr. Ross?

A Just prior to leaving I asked Mr. Ross

whether he was refusing to permit inspection at that time.
Mr. Ross nodded his head in assent.

Q Are you reading from your notes of July 2nd incident? Or is it October the 7th?

A October th 7th.

Q Now coming back to July the 2nd. Did Mr. Ross state that he's not an attorney or that his attorney had interpreted the injunction to mean that F.D.A. inspection would be permitted only in the firm shipping the Diapulse in Interstate Commerce?

A That's true.

MR. MINTZ: No further questions.

MR. HYMAN: No further questions.

MR. MINTZ: One question more.

MR. HYMAN: Then I withdraw my no questions.

Q Are you saying here that you had reviewed the file?

A Yes, sir.

THE COURT: TheFDA ?

Q The F.D.A. file?

A Yes, sir.

Q I show you a paper dated November 15th, 1974 and ask you if you recall seeing the original of this or duplicate of this in the file that you examined?

Baukney/Cross
Government Rests
Motion for Judgment Under Rule 29

[096]

A No, sir. I didn't see it in the file.

MR. MINTZ: May I have it marked for identification.

THE COURT CLERK: Defendant's Exhibit F.

MR. MINTZ: No further questions.

MR. HYMAN: The government rest, your Honor.

THE COURT: We'll have a short recess, now Members of the Jury. Please do not discuss the case with one another or anyone not on the jury until it's given to you to decide.

(Whereupon the jury leaves the courtroom)

MR. MINTZ: I move, your Honor, for the dismissal of the petition on the ground.

THE COURT: You move for the judgement of a divided rule under rule 29.

MR. MINTZ: At this point I add to that part of my motion on the ground that the evidence is such to establish the charges beyond a reasonable doubt. And also on each of the grounds that I've previously urged on the various motions to dismiss.

THE COURT: You renew your motion to dismiss the petition as failing of the charges and offenses. You do not agree?

MR. HYMAN: I don't think the evidence agrees,

your Honor.

THE COURT: Which is more important. Then shall we take the argument?

MR. MINTZ: I don't think I can add anything except to say that the testimony given here, I think supports every contention I've raised before. We have written notices which the witness testified they were required to present by law under the practices of admission. Those notices were limited to inspection of the premises in which contained products produced or held for Interstate Commerce.

Thus, it excluded everything else and where the F.D.A. deems its bound to give written notice of what they want to inspect any alleged oral statement in that amplification of admission there's not a written notice in the first place and contrary to the notice given. And those circumstances, how a defendant can be expected to deem it themselves properly asked for inspection of the things beyond that covered in the written notice I fail to see, it.

Also, these witnesses have testified that they were told that by Mr. Ross on each occasion that they were preceeding on the basis of counsel's advice; that the injunction didn't include by its contention

Trial Transcript
Motion

inspections at the time when no Interstate Commerce was being engaged in.

Now, I know your Honor disagrees with that construction of the judgement.

We will offer in evidence--

THE COURT: The decree is in evidence.

MR. MINTZ: Yes the decree is in evidence.

I think at this state of the record it must be assumed that they may have given that reason for not permitting inspecting in good faith in relying upon counsel's advice.

THE COURT: That I think is for the Jury to decide. That can not be taken as given at that point of the records under any circumstances.

Well, the motion will be denied.

I take it you wish to present evidence.

MR. MINTZ: Yes.

THE COURT: We'll have a short recess.

MR. HYMAN: Thank you, your Honor.

MR. MINTZ: Exception.

(After fifteen minute recess the Jury enters the courtroom)

MR. MINTZ: We call Jess Ross to the stand.

J E S S E R O S S , having been duly sworn, testified as follows:

Trial Transcript
Jesse Ross/Direct

[099]

DIRECT EXAMINATION

BY MR. MINTZ:

Q Mr. Ross, are you the President of Diapulse Corporation of America?

A I am.

Q And since when have you been?

A Since In September 1967.

Q And Diapulse Corporation of America has conducted business since that date?

A Yes, sir.

Q After July 18th, 1974, did the corporation at any time there after manufacture or produce anything for introduction to Interstate Commerce?

A No.

Q Did the corporation at any time after July 18th 1974 introduce any of your products into Interstate Commerce?

No.

Q On July 2nd, 1974 did you tell the investigators that you were declining to give them access to records because your counsel had advised you?

A Yes.

MR. HEMAN: Objection. I move to strike.

MR. MINTZ: May I finish the question.

THE COURT: Well, no because It's so full of instructions that I don't see how Mr. Ross can fail to understand what you want him to testify to.

Don't lead.

MR. MINTZ: Very well.

MR. HYMAN: Move to strike the answer.

THE COURT: He's trying to answer. It is stricken.

1 MR. MINTZ: There's no dispute that the government witness--

THE COURT: I understand. Which meeting are we talking about?

MR. MINTZ: July 2nd.

THE COURT: I think he better testify to it himself.

Q Would you tell us the substance of your conversation with the F.D.A. investigator on July the 2nd 1975?

A Well, we had a visit by two gentlemen from F.D.A.. I don't recall their names. I think Baukney was one of them and the other chap. And they presented their credentials and he asked to give me an inspection notice and said he would like to see the records and plant of our corporation. And I advised him that in accordance with our advice from counsel that they first-- we had

nothing to show them with reference to the shipping in Interstate Commerce or any records in shipping in Interstate Commerce. Certainly we didn't have anything for Interstate Commerce in your manufacturing plant.

And secondly, I suggested that they submit their requirement in writing so that I can submit them to our attorney who in turn advised me as to what I should show them and what I should not show them. And also if there was any question we would go back to the court for a decision on it.

That was the sum and substance of our discussion.

Q I show you some papers dated August 14, 1974, and ask you whether you received that on or about its date?

A Yes, I did.

MR. MINTZ: I offer it into evidence.

MR. HYMAN: No objection.

THE COURT CLERK: Defendant's Exhibit G.

Q Are you a lawyer?

A No, I am not.

Q Did you ever study law?

A No, I did not.

Q Did you ever have any training in law?

Trial Transcript

Jesse Ross/Direct

A No, sir.

Q When you received this document Exhibit G in evidence what was your reaction to it?

A I believe I had called you with reference to the receipt -- after the receipt of this and then I referred to try to clarify as what I can and can not do. And we referred to item two down here.

THE COURT: What is that?

A Item two which discussed the statement I was to make to the inspector if we had an inspection and what I was to show them and what I was not to show them. And we follow these instructions explicitly.

Q Did you tell him that in good faith?

A Yes, sir.

Q How long had I been serving you as your attorney in connection with the Diapulse matter?

A I would say, oh, four years I guess.

Q And in the course of those four years did you come to any conclusion as to whether or not you can rely on my opinion and advice?

A Yes.

MR. HYMAN: I object, your Honor. I think I'll make a concession that Mr. Mintz is a member of

the bar of the State of New York and a fine lawyer. But that doesn't mean that he can testify for this defendant nor is he allowed to in this particular case. And I think--

THE COURT: Counsel.

MR. HYMAN: Well, we have another letter from Mr. Mintz, that Mr. Mintz wrote to the Diapulse Corporation. Are they relying on the advice of Counsel for this marked compliance? Yet, the letter is good legal advice capped in recalcitrant language.

THE COURT: You mean it's full of weasels.

MR. HYMAN: And the point is the fact that Mr. Mintz directed the Diapulse Corporation with regard to the P/EMF and the dialysis machine that the government has a right to inspect.

It also, on the last paragraph, has a characterization of a part to the effect that well, "You know, I'm not infallible as we all are and that I might not be right." And that's what the letter says.

MR. MINTZ: In the first place, I don't agree to your characterization of some part of it. I do have those several exculpatory provisions.

THE COURT: No doubt compliance with the Barkley Act (Phonetic) and all that.

MR. MINTZ: But they were instructions as to what I thought was their obligation.

THE COURT: Well, I see when you started again asking him whether he found, in effect found, your advice sound in the past and --

MR. MINTZ: I didn't ask him that. I believe it to be so.

THE COURT: Believed it? Didn't you open it up to Mr. Hyman, can you think of a single motion, appeal or contention that in which you have prevailed while operating in Mr. Mintz's instructions and the ^{answer} would be, no.

I think you both are leaving it where it is.

MR. MINTZ: I thank you for the advice. All excepted.

MR. HYMAN: Frankly, I didn't want to answer it. I have too much respect for Mr. Mintz.

THE COURT: Better leave it where it is.

Q I withdraw the question. On October 15th, 1975 when you told the inspector that you're relying on Counsel's advice, what were you referring to?

A To the advice given to us by you.

Q And you gave him--

THE COURT: Does that answer mean the advice incorporated in Exhibit G?

THE WITNESS: Yes, sir and also verbal conversation to confirm what we could say and can not say.

Q And, as a matter of fact, you gave him my name?

A1 Yes, I did.

Q As the attorney on whose advice you were relying?

A Yes, sir.

Q I show you paper dated November 15th, 1975, marked Exhibit F. for identification and ask you whether you signed the original and what did you do with it?

A This was a letter that we sent to Larry Pielot(Phonetic) Acting Director of the Bureau of Medical Devices that were sent--

Q On or about that date?

A On that date, November 15th.

MR. MINTZ: Offered in evidence.

THE COURT: Had you shown that to Mr. Hyman.

MR. MINTZ: I did. He objected to it.

MR. HYMAN: No, he didn't Judge. No objections.

[100]

MR. MINTZ: All right. Letter addressed to Larry Pielot(Phonetic), Food and Drug Administration, Public Health Services of H.E.W., Rockville, Maryland, attention Larry Pielot(Phonetic) Acting director --

THE COURT: I would say you fully answered my questions.

THE COURT CLERK: Defendant's Exhibit F in evidence.

Q As far as you know, Mr. Ross, well, I'll withdraw that. You know, do you not, that the injunction contains several provisions to reports to be made at specified times?

A Yes, sir.

Q As far as you know were all those provisions complied with?

A In accordance with your instructions we complied with every one of them.

Q And this letter of November 15th is one of those reports?

A That is right.

MR. MINTZ: No further questions.

CROSS EXAMINATION

BY MR. HYMAN:

Q Mr. Ross, on August 14th of 1974, you received

Defendant's Exhibit C which is a letter from Mr. Mintz to yourself as President of Diapulse Corporation, is that correct?

A That's right, sir.

Q Did you solicit any of the information contained in this letter? Did you ask Mr. Mintz for a legal document concerning your rights under the injunction or what you could do and not do or did Mr. Mintz just send it to you as any good lawyer would do?

A Well, I don't understand your inference about the good lawyer. We had discussed the injunction when it was issued by Judge Dooling. We asked what we could do and what we couldn't do and that was a confirmation of what was discussed at several conferences with Mr. Mintz.

Q So, there is no question then as of July 18th 1974 and at least as of August 14th, 1974, you had notices and knowledge of the contents of the permanent injunction issued by Judge Dooling on July 18th, 1974; is that correct?

A As I indicated before, I'm not an attorney, and the interpretation--

Q I'm asking you whether you knew the injunction and knew of its contents not whether or not you

Trial Transcript
Jesse Ross/Cross

[108]

understand it.

A Yes, I knew of the injunction. I was here when Judge Dooling issued it and I had the injunction as per the instructions distributed to all--

Q At least August 14th, 1974, according to Defendant's Exhibit G you knew in detail papers F, B of the injunction; isn't that correct?

A You're saying I knew in detail. I had it but I didn't understand it.

Q You had it in your lawyer's letter and he explained it to you.

A He explained what I could do and could not do.

Q Did you have it in detail, word for word, paragraph F,B of the letter of August 14th, 1974?

A Physically I had it.

Q Didn't you have an explanation by your lawyer to you of what you could do and not do; is that correct?

A That's exactly right.

Q Now, on page two of Mr. Mintz's letter to you he goes into some sort of detail; is that correct, as to what a prohibited device is; does your lawyer use the word prohibited device?

Trial Transcript
Jesse Ross/Cross

[109]

A Yes, he refers to--

Q Yes or not, sir?

A I just have to. I can't give you a yes or not. Here it refers to section 2, land 2, page 1, 2 and 3, prohibited device.

Q He uses the word prohibitive device?

A Yes, sir.

Q Does he go on to explain that a prohibitive device is a Diapulse Machine; yes or not, sir?

A No, he talks about P/EMF or by any other designation. He does not talk about Diapulse per say.

Q What is a P/EMF?

A That is a Diathermal (Phonetic) Machine which we had devised in order to save the machine that was in the doctor's hand.

Q A converted Diapulse Machine?

A Not a converted.

Q It had a modification that you had put in old Diapulse?

A Once you put in the Diapulse Machine it's no longer a--

Q Then it becomes a prohibitive devise?

A Pursuant to Judge Dooling--

Jesse Ross/Cross

[116]

Q On devices that could not be shipped in Interstate Commerce?

A Which we didn't ship.

Q It had to be returned to you?

A It didn't have to be returned. We had to notify the doctor that they should return.

Q And the kit that converted the Diapulse Machine to the device, the P/EMF they had to be returned?

A They didn't have to be. They have a choice of either keeping them or returning it.

Q Does Mr. Mintz tell you that in that letter?

A That's what I understand it.

Q Can you read the paragraph in that letter where Mr. Mintz tells you that what you just understood?

A It says, " For definition of that we have to turn to Section 2(E) 1, 2 and 3 on pages 2 and 3. "Prohibited device", under those provisions is a Diapulse "heretofore shipped, sold, leased or introduced or delivered for introduction into Interstate Commerce" - of which, I assume, you have none or very few. " Any device known as P/EMF or by any other designation including any device defined in Section 2 (F) (1) above as modified to covert the said device to a P/EMF device", and any device of which " the peak power available at any set after the

Trial Transcript
Jesse Ross/Cross

[11]

said device does not exceed twice the average wattage at such setting," etc. I assume that you have none of the last mentioned and since there is no Section 2 (F) 1 I do not know what that refers to.

That's why I called Mr. Mintz to clarify all of this which I don't understand.

Q Didn't Mr. Mintz by that letter tell you that if you had prohibited devices, if you had or if you have the kits that converted a Diapulse into a P/EMF; if you had not what you assume you didn't have; if you had them in your premise even by Mr. Mintz's letter to you, that the government was entitled ; isn't that what he told you there?

A No.

Q Look at that paragraph.

A As I said, I don't understand it.

Q You didn't understand Mr. Mintz's instructions to you?

A I understand Mr. Mintz.

Q What did he say in that paper, sir? If you didn't understand his instructions how could you rely on instructions you didn't understand?

A As I said before I had these instructions on hand and on the instructions--

Jesse Ross/Cross

Q We'll go through the instructions easily then. Was Mr. Mintz correct when he assumed to you on August 15th, 1974, that you had-- when he used this language, " I assume that you have none or very few " any device known as P/EMF or by any other designation"; was he correct when he made that assumption?

A Yes.

Q That you had none, not one of the P/EMF?

A Not one of the P/EMF.

Q Including, and he goes on, " any device defined in Section 2(F)(1) above as modified"; you understand what that is?

A I don't know what section 2(F)1. I just doesn't --

Q Now, I show you Government Exhibit 2 in evidence and look at what you had in your possession. You had a copy of the injunction and I ask you to look at 2F1 . I ask you to tell this court and Jury if there is a 2 F 1 Section in that injunction?

A I don't see it. I don't see a F1.

Q Of the copy of the injunction that was served on you back in '74; was there an F1?

A I don't recall.

Q You don't recall. But when you got Mr. Mintz's letter did you look in the injunction to see if there was a 2F1 Section?

A No, I did not.

Q But you looked at 2F 1. What does 2F1 of the injunction say?

A "Any device known as Diapulse or any other designation including any device defined in Section 2F1 as modified. Then it has 100J, D101, 2 and 3, shipped sold, leased or introduction and delivered for introduction into Interstate Commerce."

Q That is a prohibitive device isn't it?

A They are--

Q Isn't that prohibitive devices?

A Yes, sir.

Q Did you have devices which were prohibitive under the injunction in your plant or office on October 7th, 1975?

THE COURT: As returned.

A As returned?

A No.

Q Or otherwise. You had devices on your premises is that correct?

A We had not.

Q You did not?

A We did not.

THE COURT: Now, you must bear in mind this is not limited to the New Hyde Park; any of your premises.

THE WITNESS: In the warehouse we just have literature.

THE COURT: Just wanted to make sure.

Q You had not one Dispulise Machine?

A That was a prohibitive device? We had machines that were for export.

Q Didn't people return machines to you?

A Well, they returned it after the date in which we reported it to the F.D.A. as prohibitive by Judge Dooling.

Q What happened to those machines?

A Well, the machines are on your premises at the present time.

Q Were they on your premises on October 15th of 1975?

A I have to refer to my file; if I may?

Q You can refer to anything you want.

A What was the date?

Q October 15th of 1975.

A Yes. We did on October 15th, yes.

BEST COPY AVAILABLE

Q You had them. Now, in non-legal language not in Judge language or any other language but layman's language does Mr. Mintz tell you, in his letter, instructions to you, Mr. Ross, of August 14, 1975: Thus, it seems to me-- will you read that to the jury and judge?

A "Thus, it seems to me that the access provision, strictly speaking, covers only any Disposal you may have which have been in Interstate Transit and P/EMS.

Hence, I advise you that--

Q That's all. Did Mr. Mintz tell you on that date at least the way he reads the injunction that you must give access under the terms of the injunction to F.D.A. employees which were coming to inspect for prohibitive devices; yes or not, isn't it?

A They told me that--

Q Did Mr. Mintz tell you?

A Yes, this is the letter you're referring to. Mr. Mintz told me.

Q What did Mr. Mintz tell you; that you must allow access to federal employees; isn't that what he told you?

A You are putting words in my mouth.

Q Then you put them in my mouth.

Q What he told me was that if we had P/EMF machines that were returned we were to report them pursuant to the injunction and by the date in which we submitted a letter to the F.D.A.

Q Very good, sir.

A May I finish?

Q No, sir. Tell me what he told you in this letter, in this paragraph; not what he told you any other time.

A "Thus, it seems to me that the access provision, strictly speaking, covers only any Disposal you may have which have been in Interstate Transit and P/EMS.

Hence, I advise you that, in my opinion, if any officer or employee of the F.D.A. comes to your premises to make inspection, you have the following rights: Then he goes on to enumerate the rights.

Q Does he tell you by layman's language that under the terms of the injunction if you had a prohibitive device- in his interpretation, that you must allow the Food and Drug inspectors on your premises?

A As of August 14th.

Q That's what he said as of August 14th. Now, that wasn't "humbo jumbo, legal humbo jumbo" as incor-

porated in the alleged mumbo jumbo in the injunction which you ^{didn't} understand or in the mumbo jumbo from your lawyer's letter that you didn't understand. That you understood; is that correct?

A August 14?

Q That wasn't a mystery; it was plain language; is that correct?

A That's correct.

Q "You must provide access"; is that correct; is that correct, sir?

A No, it doesn't. That's not-- you have to follow through with the rest of the statement here.

Q Go a head.

A Would you care to hear?

Q I would like to hear whether you--

A It says, "Number one, demand to see appropriate credentials.

Q Well, did you demand to see appropriate credentials?

A I saw credentials but it wasn't designated. It says, "designation of him by the Secretary and to deliver to us a written notice of authorization to enter described portions of the premises and specify what he is to inspect." This we never received.

Number two: If the credentials and notice are satisfactory tell him that you do not manufacture, process, pack or hold since September, 1957 have not manufactured, processed, packed or held any device in whole or in part, assembled or unassembled, or components, etc. Three: If the inspector inspects anything before he leaves, ask him to give you a report.

Q When you say, "If the inspector inspects anything", doesn't that imply that there was a right of inspection of some thing?

A First of all they didn't have appropriate credentials.

Q Well, let's not get into that Mr. Ross.

THE COURT: See, you're just being asked about what the letter said and what you understood it as saying; not what happened at that time.

Q Isn't it true, sir, one more time, that Mr. Mintz advised you by letter, your lawyer, that if you had prohibitive devices on your premises that the Food and Drug people were entitled to inspect your premises?

A Providing it's -- As I understand it--

Q No, I don't want what you understand.

A I don't understand.

Trial Transcript
Jesse Ross/Cross

119

Q You didn't understand the letter?

A No, I understand certain portions of the letter.

Q Portions of the letter that were helpful to you; is that correct? Let's read the letter again. Has access means, sir, what's your understanding of access?

A To come into it.

Q To come into it. What does he say in paragraph--

A He says in here, "Thus it seems to me that access provision, strictly speaking--"

Q Now, excuse me. The access provision, he's referring to paragraph 5B of the injunction; is that correct?

A It doesn't have any reference to--

Q But he refers to-- you know that injunction by heart; isn't that true?

A That's not true.

Q Isn't that Paper 5B that he sent out in detail on page one of the letter?

A It doesn't say anything about a 5B.

Q Look at paragraph 5B, you have it in front of you.

A It's not verbatim to this 5B.

Q This is the court injunction and this is

Trial Transcript
Jesse Ross/Cross

Mr. Mintz's instructions to you. The question is doesn't he recite it verbatim, in fact puts it in quote, paragraph 5B of the injunction?

A Yes, sir.

Q He does; doesn't he?

A Yes.

Q Doesn't he go on to say on the next page in logical, not legal language, that under the provisions you must give access to the Food and Drug employees if you have prohibitive devices on your premises? Doesn't he tell you that?

A It says, " covers only any Diapulse which you may have which have been in Interstate Commerce."

Q Right. And at the time they came you had returns of Diapulse machines?

A After the time of the injunction when the time for us reporting to the --

Q You had machines returned to you; is that correct?

A We had machines returned to us.

Q Those machines were returned to you from some other state?

A What we spoke to Mr. Mintz--

Q We're not talking to you about speaking to

Mr. Mintz. Those machines came from other states. They were sent by Diapulse before to customers in other states?

A P/EMF were not sent.

Q No Daipulse?

A P/EMF was what was returned.

Q The kits were?

A No.

Q You mean they walked--

A We did not receive any kits in return.

Q Did you send kits of P/EMF to be incorporated in Diapulse machines in Interstate Commerce?

A Yes, sir.

Q Didn't you receive back from those people that you received the kits -- who made the kits into the Diapulse Machine, receive back the machine with the kits enclosed; isn't that true?

A Not wholly true.

Q Partly true?

A Partly.

Q A little bit true?

A A little.

Q You had a shipment in Interstate Commerce?

A We had machines returned.

Q That went from New York to New Jersey and New Jersey from Hawaii to New York; that's Interstate isn't it?

A Yes, it is.

Q Doesn't he say that if you had those prohibitive devices that F.D.A. was allowed to inspect; doesn't he say that?

A Not what he said to me verbal instructions.

Q Did he say that to you in a letter?

A I don't believe I interpreted this way. In 1974 it wasn't when this happened. When it happened we discussed it with him and this is what our advice was: we were instructed to follow his advice.

Q Let's follow his advice. That's always a good thing to do. Let's see what he said to you, again, Mr. Ross I'm talking about this day. We'll get to the other day.

A Right.

Q On August 14 of 1974, did he tell you by letter; "Thus it seems to me that the access provision," you know what the access provision is; don't you?

A You're talking about 5B again.

Q Yes. When Mr. Mintz told you access provision you knew what that meant; didn't you?

A When he's talking about access it's

something wherein they come into the plant and look at our plant.

Q He says, he goes on to say, "strictly speaking", that seems very straight instructions which if good, "covers only any Daipulse Machine". You know what a Diapulse Machine is?

A Yes.

Q Would you agree that the government, under the terms of the injunction had a right to inspect for Diapulse machines pursuant to this August 14th instruction of your attorney?

A That was returned to us by Interstate Commerce.

Q Did the government have the right?

A Yes.

Q So, you understand as of August 14, 1974?

A That's what I understood.

Q Also they had a right to inspect for P/EMF machines; is that right?

A That's right.

Q They also had a right to check your records concerning those shipments back and forth; is that correct, sir?

A right.

Q Now, in addition, Mr. Mintz tells you on August 14th, 1974, his interpretation of what all the legal language means because he's a lawyer and you're a layman; is that correct?

A Aha.

Q He also says, Mr. Ross wait a second. I want you to read to the Jury the last paragraph of Mr. Mintz's letter to you.

A "I am writing to you before going because as your attorney I deem it my obligation to make it clear to you my instructions of the provision of the permanent injunction.

I can do no more than convey to you my views honestly, sincerely and objectively as possible. Such are the foregoing. However, I make no claim of infallibility and my legal view doesn't always prevail. If any foregoing is not clear, please communicate with me.

Q He says he is not infallible. He says if you had any problems you should communicate with him; is that correct?

A Yes.

Q When you looked at his letter and you saw that Mr. Mintz referred to a provision in the injunction that was not even in the injunction to which 2Fl; did that create a problem for you?

Trial Transcript
Jesse Ross/Cross

A The whole letter created a problem.

Q The whole letter?

A That's why I called him to verify.

Q What about the problem that the provision in the letter to section 2F1 of the injunction; did you notice at that time that there never was a provision 2F1; you didn't look at the injunction?

A No.

Q When you got the letter you didn't look at the injunction?

A I received the letter that was his instructions. I asked him regarding-- I did not check Section 2 page 2 and 3, Section 2F

Q When you communicated with Mr. Mintz, did you write him a letter in response to the August 14, 1974? Did you write a letter?

A No, I called him on the telephone.

Q When did you call him on the telephone?

A After we received it.

Q And what if anything did you say to him?

A Well, I questioned him with reference to what I should do and should not do .

Q In reference to what you should do and should not do; in relation to the prohibitive devices?

Jesse Ross/Cross

A Prohibitive devices as well as it.

Q Wasn't it clear that he told you that the government had a right of access when it came to the prohibitive devices?

A There was a point in which we had to report to the F.D.A.

Q We're not talking about reporting. I'm not interested in reporting. I'm interested in inspection. Did you have a conversation concerning the government's right to inspect for prohibitive devices after August 14, 1974; yes or no?

A That I don't recall.

Q Specifically for that purpose. So, the inspection-- instructions given to you on August 14, 1974 concerning inspection of prohibitive devices didn't change; is that correct?

A We weren't concerned with that.

Q I'm concerned with that.

A I'm sorry.

THE COURT: That's not the question asked.

Q So far as concerned inspection, did you talk to Mr. Mintz after you got the letter of August 14?

A I talked to him with reference not about the instructions because we were not manufacturing any

devices.

THE COURT: You never talked to him about the inspection.

THE WITNESS: Yes, sir, I did talk to him about the inspection. Not on August 14.

THE COURT: When?

THE WITNESS: Well, first of all when we had this deadline to notify the F.D.A. of any returned devices or kits.

THE COURT: We're talking about government people coming into inspect; did you discuss the right of the government people to come in and inspect with Mr. Mintz after you got the letter of August 14, 1974?

THE WITNESS: I believe the discussion came up when we had the first visit by F.D.A. which was in July 2nd.

THE COURT: July Two?

THE WITNESS: 1975.

MR. HYMAN: That's correct.

THE WITNESS: That's when we had the discussion with Mr. Mintz. We didn't know that we were going to be harassed by visitors.

THE COURT: I'm afraid we have to break at this point. We have a conference on another matter with a

many lawyers involved in it. We'll break off at this point, Members of the Jury and resume tomorrow at 10:00

Please donot discuss this case with one another and anyone who is not on the Jury until it is given to you to decide.

(Whereupon the Jurors leave the courtroom.)

BEST COPY AVAILABLE

1
2 UNITED STATES DISTRICT COURT

3 EASTERN DISTRICT OF NEW YORK

4 -----X

5 UNITED STATES OF AMERICA, :

6 -against- : 75-CR-902

7 DIAPULSE CORP., et al., :

8 Defendant.

9 -----X

10
11 United States Courthouse
12 Brooklyn, New York

13 June 29, 1976
14 10:00 o'clock A.M.

15 B e f o r e :

16 HONORABLE JOHN F. DOOLING, J.S.D.J.
17
18
19
20
21
22

23 STEVEN TESSLER
24 ACTING OFFICIAL COURT REPORTER
25

Appearances:

DAVID G. TRAGER, ESQ.
United States Attorney
for the Eastern District of New York

BY: CYRIL HYMAN, ESQ.
Assistant U.S. Attorney

COPAL MINTZ, ESQ.
Attorney for Defendant

Trial Transcript
Jesse Ross - cross/Hyman

[131]

ST/tk

1-1

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

(Whereupon the witness resumes his seat in the

witness box and continued to testify as follows:)

CROSS-EXAMINATION

BY MR. HYMAN:

Q Mr. Ross, you have before you a copy of defend-
ant's exhibit G, that is the letter, your letter of August 1,
1974. Isn't that correct?

A That's right.

Q And that, we established yesterday, that on the
days in question, October 2nd and October 15th of 1974, those
are the two dates that an attempted inspection was to be made
by the Food and Drug Administration office?

A '74 or '75?

Q '75, that you had on your premises prohibited
devices to which Diapulse machines T/FM kits or machines?

A I checked last night back at the factory, I
found that there were five PEMF's that were unboxed, that were
returned by the doctors under the direction and five in boxes.
I don't know if they were TMF's or Diapulses.

Q Those are prohibited devices?

A As far as the injunction was concerned.

Q We agreed on the terms of your own lawyer's
letter to you on April 14, 1975, he advised you on that day?

A August 14, 1975?

Jesse Ross- cross/Human

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

Q August 14, 1974, that's approximately more than a year before the tentative inspection; is that correct?

A We received this letter, yes.

Q And he advised you that the Food and Drug Administration inspector had a right to inspect your premises to see if those devices were there, is that correct?

A There is a little confusion on that.

Q There is a little confusion on that?

A I said a little confusion.

Q You said yesterday after cross-examination that that is exactly what Mr. Kopel said to you, that under the terms of the injunction it seemed to him that the access provision strictly speaking, covers only any Diapulses which have been in interstate transit and 2/EMF, isn't that what he said?

A No, that is not what he said.

Q Well, it's in writing, would you please read that again to the jury?

A It doesn't seem to me that access provisions, strictly speaking, covers only Diapulses you may have which may have been in interstate transit and 2/EMF's.

Q Is that what the lawyer said to you?

A This is what it says in excess provision.

Q In excess provision is the 5-B provision of

Trial Transcript

[133]

Jesse Ross - cross/Hyman

1
2 the permanent injunction of '74, is that correct?

3 A I would assume so.

4 Q But, you have the exhibit in front of you, sir,
5 you want to get through that again: didn't your lawyers also
6 point out to you the access provision of the injunction verbatim?

7 A Yes, he did.

8 Q And doesn't the access provision provide that
9 your premises may be inspected by Food and Drug Officers at
10 reasonable times? Isn't the word "inspection" used in the
11 injunction?

12 A Yes.

13 Q Doesn't it say it can examine records, machines,
14 plans, et cetera?

15 A Yes.

16 Q Didn't your lawyer advise you in 1974 by letter
17 that the Government had a right to inspect?

18 A They had a right to inspect if they came in with
19 the proper credentials.

20 Q It didn't say anything in that paragraph about
21 proper credentials?

22 A But further on --

23 Q Let's talk about that paragraph.

24 MR. MINTZ: I object, if your Honor please.

25 THE COURT: He may ask for a full and fair

Trial Transcript
Jesse Ross - cross/Hyman

134

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

answer to the question he has.

THE WITNESS: My answer is yes, and a fair answer would be that further on it states that the man to see appropriate credentials as stipulated by him, written notice, under the injunction.

Q Let's go to that point.

An unqualified answer, according to your lawyer, in response to my question that the Government had a right to access for inspection provided certain things occur.

Would you agree that is what your lawyer said?

A Yes.

Q By the way, Mr. Ross, 1974 wasn't the first year that Food and Drug inspectors attempted to inspect your premises, is that correct?

A That is correct.

Q Isn't it a fact that in July 1972 after the original injunction was issued you refused inspection by officers of the Food and Drug Administration?

A I do not refuse inspection.

Q Do you remember testifying, sir, on April 17 of 1974 before the Honorable John F. Dooling in a case entitled United States against Diapulse Corporation, page 1043, line 24:

"Question: Do you recall that in July of 1972, after the injunction was issued, refusing to have two

Trial Transcript

Jesse Ross - cross/Hyman

1
2 inspection of the Food and Drug Administration coming
3 to your plant and inspect the facilities?

4 "Answer: Yes, sir."

5 Did you hear that question and give that answer
6 on April 17 of 1974?

7 A I don't recall, I don't have the book.

8 Q Let me show it to you.

9 A I believe those inspectors did come to our plant
10 by a simple procedure of going to the court and requesting a
11 permission for the court to come to our plant.

12 Q Mr. Ross, I asked you a simple question, it
13 deserves a simple answer. Did you testify on that date in
14 response to that question, yes, sir, I refused two inspections?

15 A Yes.

16 Q Is that your answer?

17 A Yes.

18 Q You agree?

19 A I don't know the circumstances under which --

20 Q I didn't ask you the circumstances, I asked you
21 if you were asked that question and gave that answer?

22 A Yes.

23 Q So, you had experience with Food and Drug
24 inspections, is that correct?

25 A I had a lot of experience with their inspections,

Trial Transcript
Jesse Ross - cross/Hyman

[136]

1
2 yes.

3 Q Has there ~~may~~ been a case when a Food and Drug
4 inspector came to your premises while you were there, when he
5 did not issue a notice of inspection to you?

6 A Yes, he issued a notice.

7 Q In all cases, is that correct?

8 A Yes, that is right.

9 Q And that notice said to you that he has a right
10 to inspect, is that correct?

11 A May I see the notice, please?

12 Q I show you Government's exhibit B-1 in evidence.
13 A notice of inspection.

14 A I believe there is another one there which I had
15 underlined.

16 THE COURT: There is two more.

17 Q They're all the same form?

18 A There are some words which we requested from
19 our attorneys.

20 Q I show you B in evidence?

21 A Right, sir.

22 Q You want another one?

23 A This is fine. Thank you very much.

24 Q Is that --

25 A What you presented to me was an inspection form

Trial Transcript

Jesse Ross - cross/Hyman

[127]

1 which said in essence interpret as reasonable time any factory
2 warehouse, establishment, where Food and drugs and cosmetics
3 are manufactured, processed, or held for introduction to inter-
4 state commerce.
5

6 Q You want to insist on interstate commerce?

7 A It's not a matter of insisting, it's what it says
8 here.

9 Q I ask the Court to take judicial notice of U.S.
10 Code Service Title 201, Section 321, definition. And I ask
11 321 sub-division b, and I ask Mr. Ross, not being a lawyer, of
12 course, I appreciate that, if he would please read sub-division
13 b out loud as to the definition of what interstate commerce
14 is under the act.

15 MR. HYMAN: I object to that, your Honor.

16 THE COURT: That is entirely separate matters,
17 because that had been touched on by the witness earlier
18 when he pointed out that he would devise that the port
19 sales were for the purpose, this degree, and be under,
20 if not regarded as transactions in commerce.

21 MR. HYMAN: I understand that, your Honor, but
22 we're talking about the notice of inspection, in which
23 he read that interstate sales in his interpretation did
24 not include -- Mr. Kopel's letter did not cover the act,
25 it covered the injunction.

Trial Transcript
Jesse Ross - cross/Hyman

[138]

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

May I see if I can lay a foundation, your Honor?

Q Did you ever read the Food and Drug Act, before,
Mr. Ross?

A Only in relationship to labeling.

Q You never looked at that section of the defini-
tion?

A No, I never did.

Q Where, did you read the section on labeling of
the act?

A It was sent to us by Dr. Jennings' associate,
commissioner of FDA.

Q Isn't it true, Mr. Ross, and I show you defend-
ant's exhibit A in evidence, that at that time on October 15th
and in fact at any time not involved in the case of this case,
when inspection was conducted that the Food and Drug inspec-
tors did in fact take out a little type wallet or badge and
present them to you, isn't that correct?

A Yes.

Q Wasn't it a fact, sir, on October 15th you even
took the page off one of the inspectors and read the memorial
into your tape recorder; isn't that correct?

A I didn't read the memorial into the tape
recording, what I read into the tape recorder was his inspec-
tion notice.

Trial Transcript

*.. [339]

Jesse Ross - Hyman/cross

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

Q What did you read the wording under the authorization of inspectors when they presented you with the badges?

A Yes, I did.

Q Didn't they say that they were authorized by the Commissioner to conduct the inspection?

A This was in conflict according to our attorney to what the statement made in his letter of August 14th in which he said demand to see appropriate credentials designating him by the Secretary.

Q Of who, sir?

A Secretary of Health, Education and Welfare.

Q You know, sir, that the Food and Drug Administration is an umbrella group of the Health, Education and Welfare?

A Yes.

Q You know, of course and are wholly familiar when your lawyer says authorization by the Secretary, that that authorization could be in fact in law which is contained in the Federal register and within the statute, is that correct?

A I hve no idea of that.

Q You have no idea of that?

A No.

Q You expected to see the head of the big agency department of HEW could have his signature on a piece of paper

Trial Transcript
Jesse Ross - cross/Hyman

* 3 [140]

1
2 saying these agents were --

3 A It depends upon my attorney, what I might look
4 for, and I looked for what my attorney said to look for, and
5 it didn't say it.

6 Q You saw these credentials and saw these creden-
7 tials stated they had a right to inspect?

8 A Yes.

9 Q But not the Diapulse Company?

10 A That is not true. Anything that is manufactured
11 for sale or retail interstate commerce, that they have a right
12 to inspect according to their inspection notice and we had
13 nothing to inspect.

14 Q Didn't inspectors tell you on October 15th,
15 this conversation which you recorded, that if you violate or
16 deny them the right of inspection, you have violated the terms
17 of the injunction, didn't they tell you?

18 A I asked them how and why, but they didn't tell
19 me how and why. If they did, I would have called my company
20 attorney immediately and given a ruling on what we should do.

21 Q I didn't ask you to answer the next question.

22 MR. HYMAN: Your Honor, may I have a ruling that
23 the witness answer the question?

24 THE COURT: Answer the question and I assure you
25 your attorney would appreciate it if you did not vol-

Trial Transcript

-- [111]

Jesse Ross - cross/Hyman

1
2 unteer things. Anything he wants to put in the record
3 he will ask you, don't worry.

4 Q The question, I will rephrase it.

5 Did the inspectors advise you on the meeting
6 of October 15th, the one you recorded on your tape recorder,
7 that if you do not allow the inspection you are violating the
8 terms of the injunction; did they say that?

9 A They said we are violating the rules of the law
10 of the FDA and the injunction, yes.

11 Q Okay, they said you are violating both the law,
12 Food and Drug Law, and the terms of the injunction?

13 A That is what they said.

14 Q You're violating both?

15 A That is right.

16 Q Not just one, but both?

17 A Yes.

18 Q One of them said that at that time, is that
19 correct?

20 A I understood what they said, but I didn't know
21 why or how.

22 Q Now, I ask you, sir, to go back to the letter
23 that your lawyer wrote you and isn't it true in simple language,
24 not lawyers' language, that your lawyer advised you in
25 the second paragraph of the letter of April 14, 1974?

BEST COPY AVAILABLE

Trial Transcript

Jesse Ross - cross/Hyman

1

2

A August 14, 1974.

3

Q August 14, 1974, I am sorry.

4

5

However, you are presently governed by the permanent injunction of July 18, 1974, did he tell you that?

6

A Yes.

7

8

Q And he tells you that after he cites to you the Food and Drug law, which he says in essence, that that does

9

not apply to you; is that correct? When he says, however,

10

you are presently governed by the injunction?

11

12

A That is what it says here, however, you are presently governed by the injunction.

13

14

Q That means you're not governed by the Food and Drug Law, but the injunction?

15

A This I don't know.

16

Q Doesn't he say it?

17

18

A You're telling me something I should know, or possibly could be instructed in, but I have no idea whether the Food and Drug Law takes precedence over --

19

20

Q You're an educated man, aren't you?

21

A Sometimes I doubt it when I read a paper like this.

22

23

Q But you have been in business for a good many years, haven't you?

24

A Yes.,

25

Q Your corporation deals internationally, isn't

BEST COPY AVAILABLE

Trial Transcript

Jesse Ross - cross/Hyman

1

2

that true; you deal with France, Germans, English, Spanish,
3 and Canadians, isn't that true?

3

4

A Yes.

5

6

Q You conduct business dealings with these people,
isn't that true?

7

A Yes.

8

Q You have had no problems with them in contracts?

9

A I have attorneys that draw the contracts.

10

11

Q Not only are you a businessman, sir, but you
read the medical literature; isn't that right?

12

A That is correct.

13

14

Q Isn't it a fact you have read over four hundred
medical books in your time?

15

A Possibly more.

16

17

Q Isn't it a fact although you're not a doctor
you lecture around the world and have lectured in approximately
18 one thousand places on the biophysical effects of electro-
19 magnetic energy?

20

A That is correct.

21

Q It's complicated, isn't it?

22

A It's simple, not complicated.

23

24

Q Simpler than plain English when your lawyer
tells you you're governed by the terms of the injunction.

25

That you didn't understand?

Trial Transcript

7- [114]

Jesse Ross - cross/vman

1
2 A I understand we're governed by the injunction,
3 I said that before. But I didn't know it takes precedence
4 over the other laws as you asked before.

5 Q I didn't ask you if it takes precedence?

6 A Yes, you did.

7 Q I asked if he said to you on August 14, 1974,
8 however, and it's after he discussed the Food and Drug law
9 you are presently governed by the permanent injunction of
10 July 18, 1974 which provides you should authorize or let your
11 premises be open for inspection, isn't that what he said to you?

12 A That is right.

13 Q So, your lawyer didn't say, wait a second, don't
14 let them in. He said to you if they present you with creden-
15 tials.

16 A Proper credentials, under the injunction.

17 Q You should let them in?

18 A That is right.

19 Q Yes, in this case they presented you with a
20 notice of inspection and they presented you with their identi-
21 fications, which authorized their inspection, isn't that
22 correct, and told you about the terms of the injunction?

23 A No, they did not.

24 Q Didn't he say that if you didn't allow the
25 inspection you're violating the terms of the injunction?

Trial Transcript

Jesse Ross - cross/Hyman

1
2 A You said they told me about the injunctin and
3 they did not tell me about it.

4 Q Who told you about the injunction?

5 A I knew about it when Judge Dooling made his
6 ruling.

7 THE COURT: I think you're being repetitious
8 at this point, Mr. Hyman.

9 Q Now, your lawyer's letter of August 14, 1974,
10 in the access division your lawyer tells you that the inspec-
11 tion provision covers only any Diapulse machine which you --
12 any Diapulse which you may have, which have been in interstate
13 transit. Is that correct?

14 A Where is that, sir?

15 Q It's in the middle of the second page.

16 A It says you may have, or which have been in
17 interstate transit and MEM.

18 Q He also tells you about the P/EMF machines, is
19 that correct?

20 A Yes, sir.

21 Q But he doesn't qualify the P/EMF machines as
22 having to have been in interstate transit, does it?

23 A Yes, he does. It says, have been in interstate
24 transit and P/EMF.

25 Q That is what I am saying, he says the Diapulse

Trial Transcript

-- [118]

Jesse Ross/ cross/Pyman

machines have to have been in interstate transit?

That is right.

But it doesn't use that phrase, interstate transit, for the P/EMF?

I assume it's referring to it.

Don't assume, let's see what it says. He didn't say that, did he?

I would assume it includes P/EMF. By reading it, it would include P/EMF.

Mr. Ross, did he say that or did you assume that?

This is what it says here.

It says covers only any Diapulse which you may have, which has been in interstate transit, and there is no qualification or modification clauses after that, and he just says and P/EMF, doesn't he?

My understanding of this -- Pardon me for not being an attorney, my understanding is any Diapulse machine and P/EMF.

You know, I didn't ask you for your understanding.

THE COURT: Please proceed, if you go this ground has been covered by you.

Now, I ask you to look at Section 2-B of the injunction.

Trial Transcript
Jesse Ross - cross/Hyman

THE COURT: D?

MR. HYMAN: B.

THE WITNESS: Yes, sir.

Q Isn't there a definition of devices of what devices?

A May I read it? The terms device.

Q Read it to yourself.

A Yes, sir.

Q And isn't it a fact that the injunction covers not only the Diapulse machines and P/EMF machines, but also the component parts, the mechanics of the machines?

A The mechanics or manual, but the component parts and accessories and assemblies.

Q That is all covered by the injunction?

A Not the mechanics.

Q Are the tubes covered?

A Yes.

Q The components?

A Yes.

Q Do you have any of those parts in your premises on October 7th and October 15th?

A No. We did not. We threw them away or put them back into stock, which made Diapulse machines.

Q That is what I am asking you. Did you have parts

Trial Transcript

[148]

Jessee Ross - cross/Hyman

1
2 of the Diapulse machine on your premises on October 7th and
3 October 15th?

4 A Yes. We did, which was used for support.

5 Q I didn't ask if it was used for support. Did
6 you have the parts on your premises?

7 A I made Diapulse for -- interstate use.

8 Q I asked you if you had Diapulse parts that were
9 not put in the machines on the premises on that day?

10 A Right, sir.

11 Q You had them?

12 A Yes, sr.

13 Q Isn't it a fact under the terms of the decree,
14 the government could inspect those parts?

15 A Only components.

16 Q Look at the decree.

17 A You asked me a question, I am trying to give you
18 an answer.

19 Q Under the terms of the decree, not under the
20 terms of the law.

21 A I would assume so.

22 Q You would assume so. Isn't it a fact that your
23 lawyer's letter of August 14, 1974 doesn't discuss anywhere
24 in the course of this correspondence to you the fact that the
25 government had a right to inspect your inventory, it doesn't

Trial Transcript
Jesse Ross - cross/Hyman

1
2 say anything about that, does he?

3 A He says in here, yes, number two, he says in here
4 if the credentials and notice are satisfactory, tell them you
5 do not manufacture, process, or hold, since '72, any device
6 in whole or in part, assembled or unassembled or component
7 parts, accessories, et cetera. Therefore we had nothing to
8 show them.

9 Q But, you had parts on the premises, is that
10 correct?

11 A Yes, sir.

12 Q And you had your machines on the premises?

13 A For support, yes.

14 Q But you also had machines that were sold in
15 interstate commerce and were returned to you?

16 A Those are not our machines.

17 Q Those are not your machines?

18 A Of the doctors and the FDA in accordance with
19 the injunction, we still hold them there, still taking up part
20 of our factory space waiting for disposition.

21 Q Isn't it a fact, under the terms of the injunction,
22 sir, you were authorized with FDA approval to send the
23 machines to some experimenters to conduct experiments?

24 A Right, sir.

25 Q Isn't it a fact that the government could have

Trial Transcript

[250]

Jesse Ross - cross/Lyman

monitored those?

A They did monitor.

Q They had a right to come in and monitor your records concerning that shipment, isn't that so?

A According to the injunction which asked for permission to send them down to the University of Minnesota, we notified them of the numbers of the machines we shipped down there and they had access to them.

(continued on next page)

Trial Transcript

[251]

Jesse Ross/Cross

Q Didn't you think the Government could verify what you did, or done, or attempted to do?

MR. MINTZ: I'm going to object, Your Honor.

THE COURT: No, it's relevant to determining what he thought with respect to these matters.

THE WITNESS: We put in writing to the F.D.A. requirements specifically as required.

THE COURT: The question was do you think that the F.D.A. had the right to come in and verify that you had done what they had permitted you to do and no more?

THE WITNESS: I don't understand, sir.

THE COURT: You do understand, answer the question please, Mr. Ross, don't play.

THE WITNESS: Would you repeat the question please, I don't understand.

(Whereupon, the last question was read back by the reporter.)

THE WITNESS: We did verify with the Government by submitting a letter in writing certified mail, return receipt requested.

THE COURT: The question is, please listen. Did you believe that the Government had a right to inspect, to see whether or not you had done what they

Trial Transcript
Jesse Ross/Cross

[52]

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

permitted you to do and nothing more than that?

THE WITNESS: No.

Q Isn't it a fact, sir, that you under the terms of the injunction there was a recall provision concerning the modification of the Diapulse machines that were modified by the kit?

A Yes. There was a recall provision.

Q And do you think again, the same question that the Government had a right under the terms of the injunction to inspect your premises to see the extent of the number of machines that were recalled?

A Under the recall provision we were supposed to send out these to the doctors to return the P/EMF machines which we did.

Q Do you think the Government had a right to inspect your premises and the record to determine if you did send out such notices to the doctors, or must they have taken your word for it?

A We send a registered return receipt request of the letters we sent out to all of the doctors.

Q They didn't have the list of sales on their hand, they had the list you gave them?

A That's right.

Q Didn't they inspect your records to verify if

Trial Transcript
Jesse Ross/Cross

*- [153]

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

that list was correct; did you think that they had that right?

A I have no idea.

I have to ask my counsel.

Q You have to ask your lawyer?

A That is right, sir.

Q How about the provisions of the injunction that says the machines had to be returned at the expense of Diapulse, do you think the Government had a right to see how Diapulse handled that aspect of the injunction?

A I don't believe so.

Q You don't believe they had that right, but you read paragraph five D of the injunction.

Correct, your lawyer told you about it on August 14, is that correct?

A He did not tell me with reference to the record that I had to show to F.D.A.

Q So, he gave you no advice?

A Regarding the records?

Q The records you had to show the F.D.A., is that correct?

A Well, in here --

Q You could not rely on Mr. Mintz as advice on that inspection, could you?

A That's not true.

Trial Transcript
Jesse Ross/Cross

[134]

1 Q At least on this letter?

2 A When I asked the F.D.A. to submit in writing
3 what they wanted to see and they did not submit it in writing
4 they wouldn't submit it in writing, how could I know or clear
5 it with Mr. Mintz, what I was to show?
6

7 Q You're bound by that injunction, show me where
8 the Government had to submit its inquiries to you in writing
9 to see the records?

10 A It would be logical and commonsense.

11 Q Please answer the question.

12 A I don't see anything in here . I didn't look
13 for it.

14 Q Do you want to look for it, look for it.

15 A In here, terms about label, supply of written
16 printed material and here, terms about labeling with written
17 printed graphic material, containers, wrappers, it talks
18 about the equipment. It bears upon any written graphic
19 material --

20 A I asked you a simple question. I didn't ask
21 you to comment what is in it. I asked the Court for a direc-
22 tion to answer the question.

23 THE COURT: Please do what you were asked to do.
24 Any place in the injunction where it says the Govern-
25 ment has right to inspect is conditioned on their

Trial Transcript

... [155]

Jesse Ross/Cross

presenting to you in writing a statement of things
which they wish to inspect?

THE WITNESS: It would be helpful if you point
out the paragraph where they have the right to come in
and inspect.

THE COURT: Roman V, Paragraph B as in baby.

Q It's also in your lawyer's letter of the 14th
of 74, August on the first page?

A Which you inspect to the court, it says here
all things are included records, files, papers, process and
facilities, it does not tell me about any type of transmittal.

THE COURT: Will you point out where in the
decree it said that? Which inspection is conditioned
on this submitting to you a statement of the things
which they wish to inspect?

THE WITNESS: No where inside.

THE COURT: Anywhere else in the decree?

THE WITNESS: This I don't know, I have to go
through it page by page. I assume it's not there.

Q How about in Mr. Mintz' letter to you of the
14th?

A There is no direction by him.

Q No direction by your own lawyer, is that correct
in the 14?

BEST COPY AVAILABLE

Trial Transcript
Jesse Ross/Cross

... [158]

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

A It says here, "Five B," it says here since 1970 you have no record, files, papers, process or facility bearing on whether any prohibitive devices have been or are being assembled, transported, or held. You cannot have records of things you do not do and we have no record.

Q That is not the question. Again, your Honor, may I have a direction that the witness answer the question.

THE COURT: You directed his attention to the letter. As I understand him, he is reading a portion of that letter.

THE WITNESS: It directs me not to show him any thing, because I have nothing to show him.

Q Does it direct you to ask the Food and Drug Administration inspectors for written instructions?

A No. It does not.

Q Did Mr. Mintz ask you that?

A No. He does not.

Q Now, on October 7 of 75, you were not at the Diapulse Plant, is that correct?

A That is right, sir.

Q And you were not aware at that time that inspectors attempted an inspection, is that correct?

A Not at that particular time.

Q When did you first find out about it?

Trial Transcript
Jesse Ross/Cross

[157]

1

2

A When I returned.

3

Q When did you return, sir?

4

5

A I don't recall the exact date, it must have been
around the 15th of October.

6

7

8

Q Before the inspection attempted on the 15th, did
you have any conversation with Mr. Joseph Ross concerning the
events of the 7th?

9

A Yes, I did.

10

11

12

Q And did Mr. Joseph Ross tell you that on October
7, two inspectors of the Food and Drug Administration attempted
an inspection at the premises?

13

A Yes, he did.

14

15

Q And did Mr. Joseph Ross tell you that he
refused to allow the inspection to continue?

16

A No. He didn't refuse.

17

Q Did he allow the inspection?

18

A No. He didn't allow the inspection.

19

20

Q Did Mr. Ross tell you that is Mr. Joseph Ross,
tell you that the inspectors issued a notice of inspection?

21

A That is right.

22

Q Did he show you a notice of inspection?

23

A Yes, sir.

24

25

Q Did Joseph Ross tell you that the inspectors
took out their identification and showed it to him?

Trial Transcript

[138]

Jesse Ross/Cross

1

2

A He didn't discuss that particular point, but I assume that they did.

3

4

Q Well, I just want to know what he told you, not what they assume that was not discussed.

5

6

A No, that was not discussed.

7

8

Q Was the injunction discussed with Mr. Joseph Ross?

9

10

A Yes. The injunction was discussed.

11

Q Did Mr. Joseph Ross tell you that the agents took out a copy of the injunction and read him a portion of it?

12

A No.

13

Q Was that discussed?

14

A No.

15

Q That was not?

16

A What was discussed in reference to it?

17

Q What was discussed in reference to the injunction?

18

19

A He said that they had read something to him, which they said was part of the injunction.

20

21

Q So, Mr. Joseph Ross told you that on October 7 when the inspectors came to inspect, the inspectors read something which they told him was part of the injunction, is that correct?

22

23

24

25

A I believe that is what was said.

Trial Transcript

Page 139

Jesse Ross/Cross

Q All right, Mr. Joseph Ross doesn't really know the operation of your company, is that right?

A He is in charge of the comptroller's end of our company, yes, sir.

Q And he knows the financial end, is that correct?

A Yes, sir.

Q And I notice that the lawyers letter of August 14, is addressed to Dear Jessie and Dear Berne, is that correct?

A Yes, sir.

Q And Berne is not the first name of Mr. Joseph Ross, is that correct?

A That is right, sir.

Q Well, did Mr. Joseph Ross ever see the letter of August 14, 1974?

A I believe he did.

Q Well, do you know?

A I don't recall.

Q Do you recall if you ever discussed this letter of August 14, 1974, with Mr. Joseph Ross prior to October 7, 1975?

A I don't recall.

Q You don't recall if it was ever discussed?

A I know we discussed what Mr. Mintz instructed

Trial Transcript

Jesse Ross/Cross

... 0501

1
2 us to do. But I don't know if we particularly had the letter
3 when we discussed what our procedure would be.

4 Q Did you not have lawyers on the Board of Directors
5 of the corporation?

6 A We have a patent attorney on the Board of
7 Directors.

8 Q He is a lawyer?

9 A Yes, sir.

10 Q Did you have any conversation with him concerning
11 this injunction?

12 A No, we did not.

13 Q He is right there.

14 A He is not right there, he is a judge in Orwell,
15 New Jersey.

16 Q But, he is part of your Board of Directors,
17 right?

18 A Yes, sir.

19 Q He is a stockholder of the company, right?

20 A Yes, sir.

21 Q You never went for a second opinion, is that
22 correct?

23 A I don't understand what you're saying.

24 Q When somebody is sick they go to one doctor
25 and the doctor tells him something then they say wait a second

Trial Transcript
Jesse Ross/Cross

.. (161)

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

I'll go to another doctor, you have had that experience, haven't you?

A Yes, sir.

Q You never went to a second lawyer for an opinion, did you?

A No. We did not.

Q In 1965, in the Connecticut Seizure Act you were represented by counsel, is that correct?

A Yes, sir.

Q You relied on what counsel told you, is that correct?

A Yes, sir.

Q And the District Court in Connecticut and you then state Second Circuit Court for the Second Circuit and the Supreme Court of the United States in essence said that lawyers didn't know what he was talking about?

Isn't that correct?

MR. MINTZ: I object to that, Your Honor, it's too remote.

THE COURT: Certainly as to the last part there is no foundation for it.

MR. HYMAN: Well, Your Honor --

THE COURT: Certiorari denied.

Q Take out the Supreme Court of the United States

Jesse Ross/Cross

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

left Judge Blumenthal and United States Second Circuit for
Second Circuit disagreed with your lawyers who have the case,
is that right?

A That is right, sir.

Q And again, in 1968, you had a lawyer representing
the corporation and a proceeding in the United States District
Court for the Eastern District, before Judge Roslind?

A The same as we had in Hartford.

Q Went up to the United States Court of Appeals
for the Second Circuit?

A Yes, sir.

Q And the Second Circuit denied certiorari?

A Yes.

Q And that lawyer was wrong again, wasn't he?

A I don't believe he was wrong.

Q The Court didn't agree with him, is that correct?

A Didn't agree, doesn't mean he was wrong.

Q And just very recently in 1974 you were represented
by different counsel, is that correct?

A That is correct.

Q And there was a case pending in this Court, is
that correct?

A That is correct.

Q And the court case went up to the United States

Trial Transcript

.. [163]

Jesse Ross/Redirect

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

Circuit Court for the Second Circuit, is that correct?

A Yes.

Q And again they didn't agree with your lawyers,
is that correct?

A Yes.

Q Yet again in 1974 with the lawyers telling you
wait a second Mr. Ross, I might not be one hundred percent
right you rely wholly on lawyers advice, is that correct?

A Thst is right.

MR. HYMAN: No further questions.

CROSS EXAMINATION

BY MR. MINTZ:

Q Mr. Ross, you have been questioned about some
refusals to admit F.D.A. agents in 1972, have you not?

A Yes, sir.

Q Was that followed by any application to punish
you for contempt?

A No, sir.

MR. HYMAN: Objection, Your Honor, it's not
relevant.

THE COURT: Objection is sustained. I move that
the answer be stricken.

MR. MINTZ: Respectfully accepted.

Q You have been asked about your lecturing, did you

Trial Transcript
Jesse Ross/Redirect

[164]

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

ever lecture on law?

A No, sir.

Q Did you ever listen on lectures on law?

A No, sir.

Q Did you ever attempt to advise on legal matters?

A No, sir.

Q I show you defendant's exhibit F dated --

MR. MINTZ: May I read this to the jury?

THE COURT: Yes.

That is November of --

MR. MINTZ: November 15, 1974.

THE COURT: 1974?

MR. MINTZ: Yes, Your Honor.

Q I think I read it, Food and Drug Administration
Dear Mr. Pilat: Pursuant to preliminary injunction filed
July 18, 1974, Paragraph 4D, 2A, B, C, please be advised that
no machines have been returned as yet, B, a doctor Chapman,
910 Third Avenue, Bloomington, Minnesota advised us the F.D.A.
had cased him, forced him to damage his P/EMF, no serial number
or model number available, See no lag has been returned as yet.
We have been informed by two trucking companies that some
equipment is enroute. We have no details about the units
other than that.

I ask you after whether this letter of November 15, 1974,

Trial Transcript

[185]

Jesse Ross/Redirect

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

you ever received any communication from the F.D.A. asking whether any additional material had arrived?

A No, sir.

Q Do you have any response to this letter?

A None whatsoever.

Q After November 15, 1974, what did you get from persons with whom you had communicated?

A From the F.D.A?

Q In regard to returning P/EMF's?

A We did receive ten pieces of equipment.

Q Ten?

A Yes, sir.

Q When did you receive those ten?

A I have a date in my file, I received some machines on December 5, 10, I am sorry, two shipments on December 5, and one shipment on December 10th.

Q 1974?

A That is right, sir.

Q What did those shipments consist of?

A Ten machines.

Q What kind?

A Five PEMF's and 5 in boxes we had not unpacked.

Q Before you had received the five P/EMF's did you have any P/EMF's on your premises?

Trial Transcript
Jesse Ross/Redirect

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

A No, sir.

Q Did you ever have P/ENF's?

A We had assembled prototype P/ENF's.

Q Was that on your premises in 1974?

A No, it was not.

Q Or ever since?

A No, sir.

Q You ever receive any communication from the F.D.A. inquiring about whether or not after November 15, 1974 you had received any materials?

A No, sir.

Q Did you receive any inquiries in regard to the machines which had been sent to the University of Virginia?

THE COURT: What?

MR. MINTZ: University of Virginia.

THE WITNESS: We had received no inquiry at all, except I believe, Joseph Ross did, but I didn't receive any decree.

Q Any written information--was anything in writing?

A Not that I recall.

Q You are now referring to the inspector's conversation with Mr. Joseph Ross on October 7th?

A That is right, sir.

Where he supplied the serial numbers of the machines to

Trial Transcript
Jesse Ross/Redirect

(167)

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

him at their request.

Q Now, after the July 1975 inquiry which has been testified to by F.D.A. individuals, did you receive any communications from the F.D.A. in regard thereto?

A In reference to their inspection?

Q Yes.

A No, sir.

Q Did you ever receive any communication regarding inspection or refusal to inspect?

A No, sir.

Q Either from the F.D.A. or from the United States Attorney?

A No, sir.

Q Now, would you tell us please what you did with the ten machines that you got back in 1974?

A We did nothing with them, we just let them sit waiting for the F.D.A. to give us instructions.

Q Was any specific mention thereof made by any inspector that talked to you?

A No, sir.

Q What are Joseph Ross' functions within your corporation?

A He is a comptroller.

Q Anything else?

Jesse Ross/Redirect, Recross

1

2

A No, sir.

3

Q What is he by profession?

4

A He is an accountant, certified public accountant.

5

Q Does he exercise any executive authority in

6

operation of the business?

7

A Anything to do with accounting and business,

8

yes.

9

Q Did nothing outside of that?

10

A No.

11

MR. MINTZ: No further questions.

12

RECROSS EXAMINATION

13

BY MR. HYMAN:

14

Q On November 14, 1974, when you wrote this letter,

15

Mr. Ross, you didn't have any machines returned to you, is

16

that correct?

17

A That is right.

18

Q But after you wrote that letter and before the

19

inspection of October 7, machines were returned to you, is

20

that correct, sir?

21

A That is correct.

22

Q Why didn't you let the Food and Drug Administra-

23

tion know that you got a shipment of machines returned by

24

letter?

25

A The question never came up with reference to

Trial Transcript
Jesse Ross/Recross

-J- [189]

1
2 the injunction specifically said I had to notify them of any-
3 thing that I had on hand that was returned in a period of time.
4 I don't recall the period of time and I did this, there was
5 no other instructions in the injunction for me to follow through
6 with anything I received after that.

7 Q You have got the injunction in front of you,
8 look at Paragraph 4C?

9 A What page is that on, please?

10 THE COURT: What page?

11 Q I'm sorry, 4D3.

12 THE COURT: What page?

13 MR. HYMAN: Page 10.

14 THE WITNESS: Yes, sir.

15 Q Paragraph 3A?

16 A Yes.

17 Q Whose obligation was it to make a proposal to
18 determine what to do with the machines?

19 A It was the obligation of the F.D.A. I believe.

20 Q You can read it, please read it?

21 A We're supposed to receive.

22 Q Who is we?

23 A Diapulse Corporation of America was supposed
24 to receive instructions from the F.D.A. regarding the discretion
25 or salvage, we can't go ahead with anything until we receive

Trial Transcript
Jesse Ross/Recross

1

2 authorization in writing to do so from the Food and Drug
3 Administration.

4

Q But the Food and Drug Administration must have
5 knowledge that you have the machines back, isn't that correct,
6 before they can tell you anything?

7

A In the same letter we told them that two trucking
8 companies had some equipment inroad.

9

Q Those trucks might have never reached your
10 premises?

11

THE COURT: Please.

12

Q Did you notify the Government that the machines
13 arrived?

14

THE COURT: He has already testified that he
15 didn't.

16

Q It was your obligation to notify the Government?

17

THE COURT: He'll not find any such language in
18 the decree, is that right?

19

THE WITNESS: Right, sir.

20

Q Isn't it a fact that you were to make a proposal
21 from the Government as to what to do with return machines?

22

A It says in the injunction here that this is
23 what we're supposed to do with reference to noticing within
24 a hundred and eighty days. I see here of a pliance of pro-
25 visions paragraph D, one, two of this section.

Trial Transcript

-- 1711

Jesse Ross/Recross
Joseph Ross/Direct

1

2

3

4

5

6

7

8

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

Q Did you ever make such a proposal: did you ever
notify the Government?

A Yes.

November 15th, letter of notification to the Government
that we had not received anything to date.

Q But when you did receive machines, did you
notify?

A We notified them in this letter that machines
were enroute, I think this would be notification wouldn't it?

Q The question is after the machines arrived, in
your premises, did you notify the Government?

THE COURT: He has testified that he did not.

THE WITNESS: No. I didn't.

MR. HYMAN: The Government has no further cross.

MR. MINTZ: Nothing further.

THE COURT: You may step down, Mr. Ross.

(Whereupon, the witness was sworn by the Clerk
of the Court.)

THE CLERK: State your name, sir?

THE WITNESS: Joseph Ross.

THE CLERK: Any middle initial?

THE WITNESS: I.

DIRECT EXAMINATION

BY MR. MINTZ:

Trial Transcript

[172]

Joseph Ross Direct/Intz

1

2

Q Mr. Ross, you are the brother of Jess Ross?

3

A I am.

4

Q What is your occupational profession?

5

A I am a certified public accountant.

6

Q For how long have you been such?

7

A Since 1940.

8

Q You have practiced that profession?

9

A To a small degree.

10

Q And you're also an officer of Diapulse Corpora-

11

tion of America?

12

A I am.

13

Q How long have you been such?

14

A Since 1969, I believe.

15

Q What were your functions, operations in that

16

company?

17

A I handled all of the supervision of the records

18

and acted as comptroller and treasurer.

19

Q Were you concerned with the manufacturing

20

operation?

21

A To a small degree only.

22

Q With shipments?

23

A I beg your pardon.

24

Q Shipments?

25

A Shipments only in connection with billings that

Trial Transcript
Joseph Ross/Direct

... [173]

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

were made.

Q Now, did you ever see a letter of August 14,
1974?

THE COURT: What?

MR. MINTZ: August 14, 1974?

THE COURT: Exhibit G, you want to show it to
the witness?

Q I show you exhibit G, and ask you whether you
had ever seen that?

THE COURT: Before October 7th.

Q Prior to October 7th?

A I really can't recall if I saw the letter itself,
no, but I know provisions of it for - or parts of it were
discussed in the office.

Q Discussed with whom?

A With Mr. Jess Ross.

Q So, you knew there was such a letter?

A Yes.

Q Did you know the extent of the advice given?

A Not particularly, I don't think I really stated
on the individual provisions of it.

Q You were on the premises of Diapulse on October
7, 1975, when inspectors of the F.D.A. inspectors came over
there?

Trial Transcript

... [174]

Joseph Ross/Direct

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

A Yes. I was.

Q Did you give any advance notice that they were coming?

A No.

Q Was any other officer of the corporation on the premises at that time?

A No. I was the only one.

Q Would you tell us please what transpired?

A The inspectors came in, gave me their -- showed me their -- showed me their credentials.

Q By that you mean the credentials that were marked in evidence here?

A That is right.

Q What else?

A They requested to walk through the factory.

Q Did they give you written notice?

A They gave me an inspection notice.

Q You have seen the one offered in evidence?

A Yes.

Q That is what you got?

A That is right. They asked to walk through the factory. I asked them why and they said to inspect the machines and equipment used in sales of interstate commerce.

I told them that we did not manufacture any machines

Trial Transcript

-4- [175]

Joseph Ross/Direct

1

2 for interstate commerce and we manufacture only for export.
3 They then requested to see the records of sales and shipments
4 and I told them that we had no record of interstate shipments
5 and since no interstate shipments were made, they told me about
6 a shipment to Virginia of eight machines and I said that the
7 F.D.A. knew about that shipment and has okayed the shipment
8 for such purpose.

9 They said that they did not know that and requested the
10 serial numbers of the machines and I gave it to them.

11 Q What serial numbers did you give them?

12 A The serial numbers of the eight machines that
13 went to Virginia.

14 Q And do you know what they were?

15 A No. I would have to look.

16 Q Do you know now?

17 A No, they're a matter of record, I don't know
18 them at this time.

19 Q And were any of those eight machines then on
20 the premises of Diapulse?

21 A No. They were not.

22 Q Did you tell them that?

23 A They didn't ask me, they knew about the shipment
24 to Virginia and the machines were in Virginia.

25 Q What else transpired?

Trial Transcript

- [178]

Joseph Ross/Direct

A Mr. Kurzbaum (Phonetic) told me that the F.D.A. considers export sales to be interstate sales or interstate commerce. I pointed out that the Government attorney had amended the permanent injunction to include exports from interstate commerce before the signing of the injunction. Then Mr. Aukley read something, made a statement of the injunction, the fact that they had a right to come in under the injunction and that I was refusing him permission to make the inspection and under the injunction --

I asked them to wait until Mr. Jess Ross came back so that he could be present when he made an inspection, but I made the specific request of the inspector to note that I did not refuse them inspection at that time. I just asked them to wait until Mr. Ross came back.

Q Did he ask you when Mr. Ross was expected back?

A Yes. They did.

Q What did you tell them?

A I said about a week which would be around the 15th of October.

Q Did you believe that at that time the injunction was being violated by what you were saying?

A I definitely knew it did not.

MR. HYMAN: Objection.

THE COURT: He may testify.

Trial Transcript

177

Joseph Post/Direct

Will you answer, please?

A I definitely did not. There was a violation of the injunction. They gave me no notice except this notice of inspection. The notice of inspection and that is on the record.

Q Did you believe that in good faith?

A Absolutely.

MR. MINTZ: No further questions.

CROSS EXAMINATION

BY MR. HYMAN:

(continued next page)

ST/TP

Joseph Ross - cross/Hyman

1-3

Q Mr. Ross, you made some, or during your examination you referred to some paper which you were reading?

A Yes, sir. This is my memorandum of the meeting.

MR. HYMAN: May we have that marked for identification?

THE COURT: The meeting of October 7th?

MR. HYMAN: 7th.

THE CLERK: Marked for identification, Government's exhibit 5.

Q Mr. Ross, did you have to take an examination to become a certified public accountant?

A Yes, I did.

Q Did you take the examination in New York?

A Yes.

Q And could you tell the Court and jury the topic that the examination consisted of?

A I don't know what you're referring to.

Q Well, isn't there a section of the examination concerning law?

A Yes, business law.

Q Business law?

A Yes.

Q And you studied that for that examination, isn't that correct?

Joseph Ross - cross/Hyman

A Yes.

Q And you studied business law?

A Yes.

Q Contracts and so forth and so on?

A Yes.

Q You took an examination given by the State of New York on business law?

A Yes.

Q And you passed that?

A Yes.

Q And inspectors on October 7th read to you the paragraph in the injunction concerning their authority to inspect, is that correct?

A Yes.

Q Paragraph 5 B?

A I don't know it was, they did not read from an injunction.

Q What did they read from?

A From the memorandum, they did not have the injunction in front of them when they read that memorandum.

Q Did they read words that sound like it came from the injunction?

A Yes.

Q Did the words they read to you tell you that

Trial Transcript

[130]

Joseph Ross - cross/Hyman

1
2 they, under the terms of the injunction, had a right to inspect
3 Diapulse corporation?

4 A Yes.

5 Q That is what they said?

6 A Yes.

7 Q They gave you no written notice to that effect?

8 A Nothing.

9 Q But they showed it to you?

10 A Yes.

11 Q And you understood it when they told it to you?

12 A Yes.

13 Q You had no problem, they spoke English?

14 A Yes.

15 Q It was in layman's language?

16 A Yes.

17 Q You understood the importance of what they had
18 to say?

19 A Yes.

20 Q In fact on the 15th you were recording this?

21 A Yes.

22 Q Didn't they again tell you and Jessie Ross that
23 if you refused inspection you would be violating the terms of
24 the injunction?

25 A Yes.

Trial Transcript

[131]

Joseph Ross - cross/Hyman

Q They said that, you understood that?

A Yes.

Q And your brother Jessie Ross was with you at that time?

A Yes.

Q But of course he never took an examination for CPA, is that correct?

A I don't believe so.

Q It didn't have a law provision on it?

A No.

MR. HYMAN: No further questions.

REDIRECT EXAMINATION

BY MR. MINTZ:

Q Mr. Ross, your study of business and the law, did you learn anything, or read anything about injunctions?

A No.

Q Court procedures?

A No.

Q Anything other than what related to accountancy?

A That is right.

MR. MINTZ: No further questions.

THE COURT: You may step down.

MR. MINTZ: Mr. Patterson, the Government Counsel, has been in this case since 1967.

1 THE COURT: You may examine him for the purpose
2 of this matter and I am sure you will know enough to
3 advise you on making an objection.

4 (Whereupon the Witness was sworn by the Clerk of
5 the Court.

6 THE CLERK: State your full name for the record,
7 sir?

8 THE WITNESS: Forrest Petterson.

9 THE CLERK: Spell it.

10 THE WITNESS: F-o-r-r-e-s-t- P-e-t-t-e-r-s-o-n.

11 THE CLERK: Thank you, please be seated.

12 DIRECT EXAMINATION

13 BY MR. MINTZ:

14 Q Mr. Petterson, what is your profession?

15 A I'm an attorney.

16 Q And are you in any way connected with the Food
17 and Drug Administration?

18 A I'm not officialy part of the Food and Drug
19 Administration.

20 Q What is your connection, if any, with the Federal
21 Food and Drug Administration?

22 A I am an attorney in the office of General Counsel
23 of Health, Education and Welfare in the Food and Drug Adminis-
24 tration, our clients are the Food and Drug Administration, but
25 we're not officially part of the Food and Drug Administration.

Trial Transcript
Pettersen - direct

-- [183]

Q How long were you in that General Counsel office?

A Since January of 1969.

Q I show you Government's exhibit 4 in evidence, and ask you whether you personally had any participation in the preparation of that paper?

A I was asked to review the text of the document prior to its being transmitted from headquarters to the New York City office.

Q And you knew of its subsequent transmission?

A I believe I received it, a copy of it, after it was transmitted.

Q Thereafter did you receive any report of any action in accordance with that document?

A Did I receive a report?

Q Yes.

THE COURT: What had been done pursuant to that?

THE WITNESS: Yes.

Q I call your attention to the last paragraph, let me read it to you.

"In response to NYK-DO R&R 2/26/75, what does that refer to?

A I'm not familiar with the designation R&R, NYK would refer to New York District office of the Food and Drug Administration.

Trial Transcript
Petterson - direct

[184]

1
2 Q Remember signing a recall number to the action
3 undertaken by the firm, what does that mean?

4 A That is with reference to a decision by the
5 administration by the agency that -- may I see?

6 Q Certainly.

7 A That has reference to the requirement of the
8 permanent injunction of July 19, 1974 that Diapulse be required
9 to advise owners of the modified Diapulse devices have been to
10 be found to be an invasion of the permanent injunction, to
11 return those devices at their expense to the corporation, and
12 since that was a court ordered action it was our opinion that
13 a recall number which refers to a voluntary market withdrawal
14 was not appropriate in that circumstance.

15 Q You continue to say here, this document continues
16 to say, does your Honor mind my standing here?

17 THE COURT: No.

18 Q Mr. Petterson, DCF 1, what is GCF 1?

19 A That is an organizational identification number
20 of the office of which I am a member. It stands for General
21 Counsel, Food and Drug Administration.

22 Q And you're identified with that division?

23 A That is the identification number for our office.

24 Q Not your personal identification?

25 A No.

BEST COPY AVAILABLE

Trial Transcript

[135]

Petterson - direct

Q Mr. Petterson, GCF 1 agrees that references to a recall be deleted, now, what was meant by that?

A There had been, as I recall, references to the action required by the injunction as a recall classified by the agency normally as a voluntary action. We indicated, since it was not a voluntary action it should not be referred to as a voluntary agency recall.

Q Does that mean inspectors were not to be concerned with recalls?

A No. It was not. It was not with reference to that aspect of the situation at all.

Q What connection did this have -- withdrawn.
This document was intended as instructions to the inspectors, is that right?

A Was it addressed to the inspectors, it was instructions from headquarters to New York's district office, eventually these instructions would have been given to the inspectors who would actually have attempted an inspection.

Q Was the effect of that to tell the inspectors not to concern themselves with the reports?

A No. It was not.

Q Why was it in the document; if it was intended as instructions?

A As I recall, there had been prior references to

Trial Transcript

11- [136]

Petterson - direct

1
2 a recall and as I have explained, normally referred to by the
3 administration as a voluntary action.

4 This simply indicated that those prior references
5 were not strictly accurate since this was not a voluntary
6 recall situation.

7 Q In the report which you received or heard or
8 saw, was there a statement to the effect that there was raised
9 on the question of the injunction of the -- that Diapulse
10 was refusing to allow inspection on the grounds that they
11 had nothing that had been passed in interstate commerce, did
12 you become aware of that?

13 A I am sorry, would you repeat the question, please?

14 THE COURT: Did the report say anything about
15 Diapulse's having refused inspection on the interstate
16 commerce crime, was that the question?

17 MR. MINTZ: That is correct.

18 THE WITNESS: On the ground that they contended
19 they were not liable for inspection.

20 Q Correct.

21 A I don't know if I received that information in
22 that particular report, but I became aware that there was --
23 their position was whether it was in that report or not, I
24 don't recall.

25 Q Well, could you tell us approximately when you

Trial Transcript
Pettison - direct

[137]

1
2 became aware of that position?

3 A It may have been before that time, I am not sure.

4 THE COURT: Before which time?

5 THE WITNESS: Before the report that he refers to.
6 I think in response to this telegram, I don't recall
7 when I became aware of it.

8 Q You have been an active participant, have you
9 not, in the litigation by the FDA or the U.S. Government on
10 behalf of the FDA, with Diapulse?

11 A Yes, I have.

12 Q You have attended all the proceedings in this
13 court in 1974?

14 A Not all of them.

15 Q Substantially?

16 A Substantially some, yes.

17 Q And you have been in touch with the United States
18 Attorney's office in that connection?

19 A Frequently.

20 Q More particularly with Mr. Hyman?

21 A Yes.

22 Q You knew that Diapulse was represented by coun-
23 sel, did you not?

24 A Yes.

25 Q You knew that I was representing them, did you not?

Trial Transcript

... [188]

Petterson - direct

A Yes.

Q Did you ever communicate with me or with the United States Attorney with a view to resolving the dispute as to whether or not the position taken by Diapulse was terrible?

MR. HYMAN: Objection, your Honor.

THE COURT: Overruled.

MR. HYMAN: May I -- Mr. Pettison does not represent the United States of America of the litigation under Title 28.

THE COURT: Does not?

MR. HYMAN: Represent the United States of America. He has no authority to represent the United States in any court proceeding.

The only agency is the United States that has that authority pursuant to Title 28, I think it is Section 405th Section, in the United States Attorney of the Eastern District of New York in this case.

Since this was a continuing litigation type proceeding, Mr. Pettison would have been, if he would have communicated with Mr. Mintz concerning --

THE COURT: And for these reasons did you, when you heard of this, communicate with Mr. Hyman?

THE WITNESS: I believe so. I don't remember specific instances, but I am sure we must have discussed it.

Trial Transcript
Pettison - direct

[189]

Q Did you discuss the likelihood or desirability
fo communicating with me either yourself or through Mr. Hyman
as to trying to arrive at a consensus in regard to the extent
of the injunction?

MR. HYMAN: Objection, your Honor. this is a
client-lawyer privilege discussing the aspects.

THE COURT: Objection sustained.

Q Were there communications on that subject?

MR. HYMAN: Objection, your Honor, on the same
ground.

THE COURT: Yes. I think we're not pursuing
anything that is proper to the subject.

Q Do you know whether or not there was communication?

MR. HYMAN: Objection.

MR. MINTZ: Let me finish my question.

THE COURT: We haven't heard the question.

MR. HYMAN: I'll apolozie, Mr. mintz. I thought
you were on the same subject.

Q --from Mr. Hyman to me?

THE COURT: Really, that calls for pure hearsay.

MR. HYMAN: Thank you, your Honor.

MR. MINTZ: Truly what?

THE COURT: Hearsay. How we know communication
between you and Mr. Hyman when his office, I believe, is

Trial Transcript

Pettison - direct

in Roddville, Maryland.

MR. MINTZ: There are telephones, your Honor.

THE COURT: I doubt whether he heard any conversations between you and Mr. Hyman of any of the work that was conducted by telephone when he was in Roddville.

Q Can you tell me what designation BMDDP refers to?

A Yes.

Q What was it?

A Bureau of Medical Devices and Diagnostic Problems.

Q And do you know what was the position of Mr. Michael Matlock?

A Mr. Matlock was a -- I am not familiar with the exact technical title that he may have had at that time, but he was a compliance officer, a Food and Drug officer in the Bureau.

Q And do you know what Mr. Dan Beardly's position was, or is?

A He was in the same area, again, I am not sure of his exact title at that time.

Q I show you Government's exhibit 1 in evidence, document dated --

THE COURT: October 3rd, I thought. Do you agree, Mr. Hyman; or maybe you better show it to Mr. Pettison, he may be more familiar with it.

Q Dated some day in October.

Trial Transcript

[191]

Pettison - direct

MR. HYMAN: October 6th, I think, it's a date they either received it or it was sent.

Q And I ask you whether you had any participation in the preparation or review of that document?

A I don't recall that I participated in the preparation of this document.

Q Did it come to you for review?

A As I recall this document did not come to me for review.

Q Do you recall -- withdrawn.

Did you ever see that document?

A Yes, I have seen -- If I haven't seen this precise document, I have seen copies of the text.

Q And could you tell us about when you first saw it?

THE COURT: What?

Q When you first saw it, approximately when?

THE COURT: Did you see it before the October inspection?

THE WITNESS: Not that I recall, no.

Q Did you see it shortly after October 7?

THE COURT: October --

MR. MINTZ: 7th.

A I don't recall that I did, no.

Q Did you see it shortly after October 15th?

Trial Transcript

-- [192]

Pettison - direct

1
2 A No, I don't recall, I saw it shortly after
3 October 15th.

4 MR. HYMAN: If I may, your Honor, Mr. Mintz,
5 excuse me, sir. The date on the telegram is the
6 year and was sent on the 276th day of the year, whatever
7 day that might be, of 1975.

8 THE COURT: The one that was furnished, the bill
9 of particulars is the same thing.

10 MR. HYMAN: But they didn't transcribe the
11 sending date, it's the same date, your Honor, except
12 the Julian year, the date on it.

13 THE COURT: Don't confuse me, I thought the Julian
14 year was thirteen days out of whack, aren't e in the
15 Gregorian year as devised by something or other?
16 Suppose anyway what the 278th day of the year was.

17 MR. MINTZ: Presumably sometime in October.

18 THE COURT: Was past the third quarter day, any-
19 way.

20 Q Did you receive, or read, or heard read, a report
21 of what transpired on October the 7th when the inspectors came
22 to Diapulse?

23 A At some point I learned about it, yes.

24 Q Could you tell us when?

25 A I don't recall my first hearing, but what hap-

Trial Transcript

Pettison - direct

1
2 pered on that --

3 Q Did you receive, or read, or heard read, a report
4 on the visit of October 15th, 1975?

5 A Yes. I did.

6 Q Could you tell us when?

7 A Not precisely.

8 Q Approximately?

9 A I don't recall apprxoimately when I heard about
10 it.

11 THE COURT: Would it help you to refer to the
12 date?

13 THE WITNESS: It might have been prior to that
14 time, yes.

15 THE COURT: Maybe you can date back to that. I
16 think it was filed November 26th, but the petition, the
17 petition was verified on that day, November 26, '75.

18 Q How long prior to November 26th did you get the
19 information?

20 A I don't recall precisely, it would have been
21 some several days or perhaps weeks prior to that time.

22 Q Several weeks, did you say?

23 A Possibly.

24 Q Did you participate in decisions to commence
25 this contempt proceeding?

1
2 MR. HYMAN: Objection, your Honor. Mr. Forrest
3 Pettison has no authority.

4 THE COURT: In light of his other answer, it is
5 not material.

6 Q Did you consider communicating with me either
7 directly or through the United States Attorney regarding this
8 matter before filing a petition?

9 MR. HYMAN: Objection, your Honor. Same grounds.
10 Mr. Pettison had no authority to communicate with Mr.
11 Mintz concerning legal matters in litigation, there was
12 an injunction posed here in continuing obligation.

13 THE COURT: I think I'll allow -- I'll sustain
14 it on that grounds, on the grounds it's not relevant.

15 MR. HYMAN: I don't want to argue the point, but
16 I do believe --

17 THE COURT: The question is now whether the
18 United States will fully enforce the decree, but what
19 the defendants fully disobeyed, please proceed, I have
20 ruled.

21 MR. MINTZ: No further questions.

22 MR. HYMAN: No further questions, your Honor.

23 THE COURT: You may step down, Mr. yettison.

24 MR. MINTZ: The defendant rests.

25 MR. HYMAN: No rebuttal, your Honor.

1 THE COURT: Gentlemen, step up to the side bar
2 for a petition to arrange schedule.

3 (continued on next page)
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

1
2 THE COURT: We have motions and charge so what
3 do you want to do, chase the jury out and have them
4 come back 1:30 on the theory that we can get all
5 squared away?

6 MR. MINTZ: It's agreeable to me.

7 MR. HYMAN: Well, are we going to have a lunch
8 hour because -- are we going to go through because I
9 have a few respectful exceptions.

10 THE COURT: They don't have to be respectful
11 as long as they're understandable and clear cut, that
12 is the main thing. 2 o'clock, give us over an hour.

13 MR. HYMAN: I think we need a half hour, if you
14 want to make it 1:30 it's fine, I was assuming during
15 that time we would have --

16 MR. MINTZ: I need some time for my motion.

17 THE COURT: 2 o'clock then we'll tell them and
18 give them time to go shopping.

19 There will be no further testimony in
20 the case and we have now to discuss the form of the
21 instructions on the law and certain legal matters
22 which we estimate will take us the best part of an
23 hour. Counsel, not unnaturally take the view that they
24 would like to have lunch, so for this reason we'll
25 recess now until two o'clock at that time you should

1
2 hear the closing arguments of counsel, instructions on
3 the law and the case will be given to you for your
4 determination.

5 Please do not discuss the case with one another
6 or anyone not on the jury until it's given to you to
7 decide.

8 (Whereupon, the jury left the Courtroom the
9 following occurred in Court outside the presence of
10 the jury.)

11 MR. MINTZ: If Your Honor pleases, I move for
12 the dismissal and/or direction of acquittal on the
13 following grounds.

14 There is no adequate proof of authoriza-
15 tion by the secretary, or duly authorized delegate of
16 the secretary to conduct any of the investigations
17 that are the subject of the petition.

18 That is the first ground, too, the proof
19 of a written notice of demand of access under the in-
20 junction.

21 THE COURT: What?

22 MR. MINTZ: There is no proof of a written
23 notice of demand of access under the injunction. Indeed
24 the written notice which was given and the credentials
25 which were exhibited were of access only under the

Trial Transcript
Motion for Acquittal

[198]

1 statute and implicitly, I have not explicitly excluded
2 access under the injunction. I mean authorization
3 of a demand for access.
4

5 THE COURT: What?

6 MR. MINTZ: I mean authorization for a demand
7 of access. There is no proof of intent or desire on
8 the part of any of the defendants to disobey the in-
9 junction or a feeling or knowledge or belief that they
10 were disobeying the injunction.

11 There is no proof justifying a finding
12 of guilt beyond a reasonable doubt, I also move on the
13 same ground to dismiss the October 7 charge.

14 My first motion is addressed to both
15 charges and this one specifically, to the October 7
16 charge. And in respect to the October 7 charge it
17 seems to me that Mr. Joseph Ross made it perfectly
18 clear that what he was saying was not final, that it
19 had to be checked when Mr. Joseph Ross returned and
20 I believe that the record indicates the testimony,
21 indicates that that was accepted by the FDA as a
22 proper instruction of what happened on October 7. No,
23 in view of the arguments which I have addressed to
24 Your Honor on previous occasions in connection with
25 this matter, I don't think any purpose will be served

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

Motion for Acquittal

by my repeating what I have here to foresaid unless
Your Honor wants me to amplify anything.

THE COURT: No. I think except to the question
of whether it was an intentional defiance of the in-
junction, it's all been discussed before and I think
as to that the jury will have to draw its own conclu-
sion from the evidence.

MR. MINTZ: Well, does Your Honor think if I
may put it that way, that the evidence will justify
the jury to find guilt.

THE COURT: Oh, yes I think so.

MR. MINTZ: All I can do is take exception.

Now, what about the October 7 charge?

THE COURT: I don't think that stands on any
different footing, the injunction is not conditioned
on the acquiescence of any particular office in the
demand or access, Mr. Ross was and is a vice president,
treasurer and has been since 1959 as I understand.

To the injunction, the language of it, the
pertinent language of it was read to him, language was
in a letter which he agrees which was --- I have not
shown to him, discussed with him, and despite everything
that has been said on both sides of the case, command
of the injunction to my mind is clear and will be clear

Motion for Acquittal

1
2 to the jury that access must be granted to determine
3 whether or not any prohibiting devices have been, or
4 are being manufactured. The fact or the assertion of
5 the fact that no prohibitive devises, I have a correct
6 assertion and it appears from Mr. Jess Ross' testimony
7 that there were not, would hardly be in answer to the
8 right of access to determine whether or not it was.
9 Now, one can say that the foolishly drafted language
10 of Section 274A and the language of the notice that is
11 2374A makes the fact which one would normally think
12 was the subject of the inspection a condition of the
13 right to make the inspection, the injunction does not.

14 MR. MINTZ: What I had in mind Your Honor is --

15 THE COURT: Someone can -- it will be clear to
16 the jury from the mere reading of paragraph 8.

17 MR. MINTZ: What I have in mind is not quite
18 that, what I have in mind is since the statute is that
19 a demand for access has to be made to somebody who is
20 in authority --

21 THE COURT: Shall grant duly authorized officers
22 and employees of the FDA free access, it doesn't say
23 upon their presenting a demand in writing. It doesn't
24 say anything about that.

25 MR. MINTZ: But once you give access must have

Trial Transcript
Motion for Acquittal

1 authority to give access. Suppose they found the
2 janitor --

3 THE COURT: I'm afraid I happen to know the
4 authority for access, there was an order or decree or
5 injunction of the United States District Court for the
6 Eastern District of New York entered on July 18, 1974
7 and affirmed by the United States Court of Appeals.

8 MR. MINTZ: I think I don't make myself clear.
9 What I am suggesting is that that provision didn't
10 authorize the FDA to break in to make the inspection.

11 THE COURT: No evidence of burglary.

12 MR. MINTZ: I am not suggesting there is any.
13 But, then there must be a access, must be given by
14 somebody in authority.

15 THE COURT: The authority for access was the
16 decree. The men identified themselves.

17 MR. MINTZ: I am just talking about the person
18 whom the demand was made, for example the janitors
19 say I don't know anything about it, I can't let you in,
20 I don't think that would be a violation of the janitor
21 of the injunction.

22 THE COURT: The question is not before us, the
23 question before us has to do with the vice president
24 and treasurer who had been such as the evidence
25 indicates since 1959, who not only was that, but was

Jury Instructions Discussion

1 the brother of the president, was familiar with the
2 decree, and as manifestly, a man of intelligence and
3 objections.

4 MR. MINTZ: I made my point Your Honor has
5 ruled I take exception.

6 THE COURT: Yes, I'm afraid so.

7 MR. HYMAN: Your Honor, may the Government
8 approach the subject of proposed jury instructions?

9 THE COURT: Yes.

10 MR. HYMAN: There are two points in the proposed
11 jury instruction that I would like to discuss Your
12 Honor, on page 9 Your Honor of the proposed jury
13 instructions in the last line you state next to the
14 last line under the injunction in question and not
15 under any other grant of authority, and that refers
16 to Government must show that the Food and Drug
17 Administration clearly presented themselves to the
18 defendants to be at Diapulse to inspect the premises
19 under the indictment in question and not under any
20 grant of authority.

21 In this Court's decision concerning that issue,
22 the Court used milder language and used the words that
23 the Government must, the inspection must have been
24 unequivocally under the terms of the injunction.

25 We feel that the language proposed on page 9

Trial Transcript
Jury Instructions Discussion

[233]
74

1 is very strong and weighted against the issue of the
2 case and should be modified.

3 THE COURT: In what respect?

4 MR. HYMAN: It should read something to the
5 effect that the defendants, as being at Diapulse to
6 inspect the premises under the injunction in question,
7 and I think it should end right there.

8 Or, modification unequivocally should be inserted
9 inspected the premises unequivocally under the injunc-
10 tion in question appeared.

11 MR. MINTZ: Does Your Honor want to hear me on
12 that?

13 THE COURT: Yes, sir.

14 MR. MINTZ: It seems to me that Your Honor has
15 heretofore made perfectly clear --

16 THE COURT: What?

17 MR. MINTZ: It seems to me that Your Honor has
18 heretofore made perfectly clear that they had to make
19 it unequivocally clear that they were proceeding under
20 the injunction, and that proceeding under the grant of
21 other authority is totally immaterial.

22 THE COURT: Is what?

23 MR. MINTZ: Immaterial and I think your word,
24 and I'm not under any other grant of authority is
25 absolutely appropriate. I should say are absolutely

1 appropriate.

2 THE COURT: I think I know what Mr. Hyman means,
3 I think I sense what you mean, just a minute, I'll say
4 something like this, I am not sure it helps any, I'm
5 not sure we won't be wise to accept Mr. Hyman's
6 suggestion and leave the rest to counsel's summation.
7 To add after the sentence having deleted, and not
8 under any other ground to infer a new sentence, it
9 would not suffice for the Government to show that
10 access was requested under the notices which are in
11 evidence as Exhibit B and B1. And that the request of
12 access was refused on the grounds that no devices were
13 manufactured or held for introduction into commerce or
14 after such introduction.

15 Sure you're better off leaving it off.

16 MR. HYMAN: I think I can live with the new
17 language Your Honor. I think the new language is of
18 -- has more equity in it but it's acceptable.

19 THE COURT: I think it's correct, maybe you'd
20 better have Mr. Pettison, you have had to live with
21 the statute.

22 MR. MINTZ: My problem is that the last two
23 lines, three lines I understand those last three lines.

24 THE COURT: What?

25 MR. MINTZ: I understand the last three lines,

Jury Instructions Discussion

1 you say, and that the request of access was refused.

2 I withdraw my comment.

3 THE COURT: What do you say, do you object to
4 the inclusion of that?

5 MR. MINTZ: No, I do not.

6 MR. HYMAN: The other comment that the Govern-
7 ment has Your Honor is on page 10 having to do with
8 taking into account advice of counsel as a defense to
9 the contempt act, I respectfully refer the Court to
10 U.S. Court of Appeals for the Second Circuit in the
11 case called U.S. v. Goldfarb are cited at 187 Fed. 2d
12 735 where the Court in a procuring decision stated that
13 advice by counsel is not a defense to an act of
14 contempt although it may be considered in mitigation
15 of punishment.

16 The law in just about all the circuits except
17 in New Jersey when considering criminal contempt cases
18 have all the circumstances have gone along with that
19 proposition that advice of counsel is not a defense in
20 a criminal contempt procedure.

21 THE COURT: I don't think it and I so stated.

22 MR. HYMAN: Well, I think Your Honor says if
23 you find the defendant Joseph Ross believed after
24 taking into account after advice of counsel, first of
25 all Joseph Ross never saw the letter, if the letter

Trial Transcript
Jury Instructions Discussion

1 was discussed factually it's not correct. But you do
2 say Your Honor --

3 THE COURT: But he was part of a discussion
4 of counsel's advice.

5 MR. HYMAN: And then you say after his taking
6 into account his advice of counsel that refusing
7 entry to the Food and Drug Administration was not in
8 violation of the injunction, then you must acquitt the
9 defendant Joseph Ross.

10 They come to testify to the fact that when they
11 refused entrance they were relying on the letter of
12 Mr. Mintz, the '74 letter I think it is, was the
13 August letter. And I think that charge is not in
14 conformity with the law or it at least gives an in-
15 ference if the attorney says it's okay they're not in
16 contempt.

17 THE COURT: But I take it your argument is the
18 attorney never said it was okay and all you have to
19 do is look at the letter of August 14.

20 MR. HYMAN: That is an argument, this is a
21 charge Your Honor.

22 THE COURT: Well, then I have not seen the
23 letter of August 4 because there was no objection to
24 its admission into evidence, is there something its
25 exhibiting, have a blue tag on it?

1 I think the letter defies interpretation, part
2 of the injunction.

3 MR. MINTZ: May I be heard on that point, Your
4 Honor?

5 THE COURT: What is that, sir?

6 MR. MINTZ: May I be heard on that point?

7 THE COURT: Yes.

8 MR. MINTZ: It isn't claimed that advice of
9 counsel is a defense, but advice of counsel certainly
10 is a factor in determining whether the original defen-
11 dant reasonably add a reasonable good faith belief
12 this contract was not in violation. Advice of counsel
13 is an important factor in it, it's not close if of
14 course not, but one of the elements -- laymen go to
15 ask for advice, and if they asked in good faith on
16 the advice given to them it certainly is a considera-
17 tion in determining whether the conduct was willfully
18 wrong.

19 Now, whatever arguments are available on the
20 basis of the contempt of testimony is a matter for
21 the jury.

22 THE COURT: Well --

23 MR. MINTZ: I don't know.

24 MR. HYMAN: I don't know Your Honor the second
25 circuit seems to indicate in this 1948 case, that in a

-288-
Trial Transcript
Jury Instructions Discussion

[798]

1 argument the appellant argues that the appellant was
2 not insufficient in finding a willfulness, the Second
3 Circuit says even advice of counsel is not a defense
4 for contempt.

5 Even where wilfulness is involved my lawyer
6 told me to do it is not a defense, you can see what
7 the state of the law will be, the defense is not only
8 contempt cases, it happens all the time in SEC actions
9 when they get a no action letter from the lawyer, it's
10 not a defense to an injunction that I acted on legal
11 advice.

12 If it doesn't rise to the defense to an issue
13 of willfulness it certainly cannot rise to a defense
14 in this case Your Honor. The letter was received on
15 consent, it's in evidence, I certainly would be argu-
16 ing to the jury and it seems to me that for better or
17 for worse the letter is entitled to be considred by
18 the jury on determining whether or not the alleged
19 violation was willful, with the knowledge that the
20 injunction was being violated.

21 THE COURT: Well, suppose I change the second
22 sentence to read this in determining whether or not
23 the defendant Joseph Ross reasonably believed that his
24 refusing entry to Food and Drug Administrators was
25 not against the injunction, strike the rest of the

Trial Transcript
Jury Instructions Discussion

[289]

1 sentence and substitute, "you may take into account
2 any advice that you find that defendant received from
3 counsel and in terms of bad advice" if however the
4 defendant Joseph Ross had reasonably had known that
5 his conduct was in violation of the injunction and
6 advice of counsel or his conduct would not violate the
7 injunction would not excuse his conduct.

8 MR. HYMAN: I think the Government could accept
9 that language.

10 MR. MINTZ: I respectfully accept the latter
11 portion of it.

12 THE COURT: No, that objection -- you must
13 accept that I'm going to charge it. And you must
14 remember to renew the exception after the charge has
15 been given, I'll remind you.

16 MR. HYMAN: The Government has no exception to
17 the charge.

18 MR. MINTZ: I have a few applications in regard
19 to the charge.

20 MR. HYMAN: I withdraw the last statement then
21 if I might.

22 THE COURT: See what happens next.

23 MR. MINTZ: On page 8.

24 THE COURT: Yes, sir.

25 MR. MINTZ: In the paragraph designaged first,

-290-
Trial Transcript
Jury Instructions Discussion

[240]

Your Honor proposes to say that?

THE COURT: That should be paragraph 5B, go ahead sir.

MR. MINTZ: That he knew that required Diapulse Corporation and required him as his vice president and treasurer to grant as Food investigators access to the Diapulse plant.

THE COURT: That is what the Government must prove.

MR. MINTZ: I misread it, I withdraw it.

THE COURT: I think it's proved by showing the decree that he had and that had been denied in your letter.

THE COURT: Well, there is a difference between knowing what the words of the instruction and the very fact.

That is for you to argue.

MR. MINTZ: Yes, and on that basis I ask Your Honor to delete the first paragraph on page 9. I suggest that you read -- I suggest that that should be left for the determination of the jury.

MR. HYMAN: Your Honor, it was read to him.

THE COURT: Stipulated. It's stipulated.

MR. MINTZ: What I'm objecting to is the words, the written suggestion that in the place of the word

1 the right there should be the provision, he knew the
2 provision for inspection contained in paragraph 5B.

3 THE COURT: You want to change it we'll change
4 it. We did not know about the decree in paragraph 5B
5 there is granted the Government a right of inspection
6 as provided by paragraph 5B.

7 MR. HYMAN: That is okay.

8 THE COURT: Okay?

9 MR. HYMAN: Now I request Your Honor this is
10 purely to preserve the record to charge the jury that
11 written notice of inspection, request for inspection
12 under the injunction was required under the procedures
13 of the FDA.

14 THE COURT: I decline so to charge, no such
15 condition was imposed by the injunction and cannot be
16 spelled out of its attorney in my judgment.

17 MR. MINTZ: I respectfully accept, I'll renew
18 that exception after the charge.

19 THE COURT: I don't think you have to repeat
20 them, but to renew exception to charge as given those
21 matters which were requested and refused in the
22 discussion.

23 Okay, let's have lunch.

24 (Whereupon, a luncheon recess was held.)

25 (After luncheon recess jury present the follow-
ing occurred in open Court)

[SUMMATIONS OMITTED]

Trial Transcript

[237]

Charge

(Whereupon, after a short recess the following was held in open court.)

THE COURT: That argument that you have before you is the petition and in the instructions I will be giving to you I will be referring to that you heard the evidence in the case and the argument of counsel and now must receive the instructions on the law that governs the case.

You, the jurors, are the sole judges of the facts. You must, however, follow the law as given you in these instructions and apply it to the facts as you find them from the evidence before you. You are not free, nor am I, to substitute our private judgment as to what the law should be for what the law in fact is.

You have been sworn as jurors well and truly to try this case and to render a true verdict. You must therefore exclude from your deliberations all bias and prejudice. You must not permit yourselves to be governed by sympathy or any other considerations not founded in the evidence and these instructions on the law.

The issues of fact to be tried are those made by the petitioner and the defendants' pleas of "Not

Trial Transcript
Charge

[338]

1
2 guilty." Bear in mind that the petition is the
3 formal method of accusing a person of a crime; it is
4 not itself evidence that a defendant committed the
5 crime charged, nor is the fact that the indictment
6 was sound any evidence of guilt.

7
8 The petition in this case charges that the
9 defendants by disobeying and violating an injunction
10 of this Court or guilty of criminal contempt of this
11 Court.

12 The charge of criminal contempt is brought
13 under Section 401(3) of Title 18, United States Code,
14 which so far as we are concerned with it, provides
15 that,

16 "A Court shall have power to punish by fine
17 or imprisonment such contempt of its authority as
18 disobedience or resistance to its lawful writ, process,
19 order, rule, decree, or command."

20 The petition begins by setting out the injunc-
21 tion which is alleged that the defendants have
22 violated. You have a copy of the relevant portions
23 of that injunction.

24 The Government alleges two specific independent
25 occasions on which the defendants are accused of having
violated the injunction in question. The allegations

Trial Transcript
Charge

1
2 of each charge are basically the same, but the first
3 act disobedience or resistance is alleged to have
4 occurred on October 7, 1975 and the second is alleged
5 to have occurred on October 15, 1975. The second
6 charge reads in exactly the same language with the
7 the exception of the date of the alleged occurrence.
8

9 There are three defendants here on trial,
10 produce the defendant Diapulse Corporation could act
11 only through its officers and employees, and it has
12 not been suggested that it acted through any one other
13 than Jesse and Joseph Ross, the corporation's respon-
14 sibility depends wholly on the acts of Joseph Ross on
15 October 7, 1975 and the acts of Jesse and Joseph Ross
16 on October 15, 1975. It follows that the corporation
17 must be and can be found guilty of the first charge
18 if and only if you conclude that Joseph Ross is guilty
19 of that charge, and must be and can be found guilty
20 of the second charge if and only if you conclude that
21 either Jess Ross and Joseph Ross or both of them are
22 guilty of that charge.

23 So far as Joseph Ross and Jesse Ross are con-
24 cerned, you must consider the evidence separately as
25 it affects each of them considering each charge
separately. You're verdict need not be the same as to

Trial Transcript
Charge

both charges nor as to both Jesse and Joseph Ross on the second charge, for you may find that the evidence differs as to each defendant and the charge.

The essential elements of the second charge of criminal contempt (that of October 15, 1975), so far as concerns defendant Jesse Ross, all of which elements the Government must prove beyond a reasonable doubt or else you must acquit the defendant Jesse Ross on the second charge are the following:

FIRST, that the defendant Jesse Ross knew of the existence of the injunction of July 18, 1974, and knew that it required Diapulse Corporation, and required him as its president, to grant Baukney and Kurzman as Food and Drug Investigators access to the Diapulse plant to conduct an inspection of that establishment under paragraph V(B) of the July 18, 1974 decree;

SECOND, that the Food and Drug investigators demanded the right to inspect the Diapulse establishment under paragraph V(B) of the decree of July 18, 1974, and made it clear to defendant Jesse Ross that such was the nature of their demand; and

THIRD, that the defendant Jesse Ross refused admission to the Food and Drug Investigators knowing that such refusal was in disobedience of the July 18, 1974 decree.

Final Transcript
Charge

1
2 If the Government proves each of these three
3 essential elements beyond a reasonable doubt, you will
4 return a verdict of guilty against Jesse Ross and Diapulse
5 Corporation on the second charge. If the Government fails
6 to prove one or more of the essential elements of the
7 second charge beyond a reasonable doubt, then you must
8 return a verdict of not guilty as to the defendant Jesse
9 Ross.

10 Again notice on this second charge that if you
11 find either Joseph or Jesse Ross guilty on the second
12 charge, then Diapulse Corporation is also guilty. If you
13 find neither Jesse Ross nor Joseph Ross guilty of the
14 second charge, then you must find Diapulse Corporation
15 not guilty.

16 These instructions have used the expression
17 "beyond a reasonable doubt" repeatedly in stating the
18 standard of proof required for each essential elements of
19 each charge.

20 Proof beyond a reasonable doubt is not proof to an
21 absolute certainty. Few things in life can be so proved.
22 Proof beyond a reasonable doubt is such proof as you would
23 be willing to rely and act upon in the most important of
24 your own affairs. If, after carefully weighing all the
25 evidence you have an abiding conviction of the truth of

Trial Transcript
Charge

[242]

1
2 the charge such that you feel conscientiously bound to act
3 upon it, then you would be free from reasonable doubt. If,
4 however, after weighing all the evidence, you have such a
5 doubt as would cause prudent persons to hesitate before
6 acting in matters of importance to themselves, such a doubt
7 would be a reasonable doubt.

8 That does not mean that each bit of the Government's
9 evidence must be found by you to be true beyond a reasonable
10 doubt. It means rather that in sum total the Government's
11 evidence must satisfy you beyond a reasonable doubt as to
12 each element of the crime charged, or you must acquit.

13 A reasonable doubt may arise not only from the
14 evidence produced, but also from the lack of evidence. Since
15 the burden of proof is always on the Government, a defendant
16 has the right to rely on the failure of the Government to
17 prove any essential element of the charge. A defendant may
18 rely too on evidence brought out on his cross-examination of
19 witnesses called by the Government. The law does not
20 impose on a defendant the burden or duty of producing any
21 evidence.

22 A defendant is presumed to be innocent and that presump-
23 tion accompanies him throughout the trial. It continues
24 unless you are satisfied on all the evidence that the
25 Government has proved defendant's guilt beyond a reasonable

Trial Transcript
Charge

[243]

doubt.

The evidence is the testimony of these witnesses and the exhibits received in evidence.

Statements and arguments of counsel and answers stricken from the record are not evidence.

The evidence includes, of course, what is brought out on cross-examination as well as what is testified under direct examination.

Your verdict must be based on the evidence. But in your consideration of the evidence you are not limited to the bare words of the witnesses and the bald facts that you find have been proved. The evidence includes the inferences reasonably to be drawn from the testimony which you hear and the facts which you find have been proved.

You are the sole judges of the credibility of the witnesses.

The motives and state of mind of each witness as they appear to you and the circumstances and inducements under which the witness testified are to be taken into account. Consider any relation each witness bear to either side of the case and the manner in which the verdict might affect him.

The testimony of defendant is competent and is to be judged by you by the same standards as that of any other

Trial Transcript
Charge

241

1
2 witness including inevitably the effect of his interest
3 in the outcome of the case.

4 You may consider the appearance and manner of each
5 witness on the witness stand, the witness' apparent candor
6 or lack of it, and the character of the testimony given,
7 whether the testimony contains inconsistencies or dis-
8 crepancies, whether it is intrinsically credible or seems
9 to you in whole or part improbable, and whether it conflicts
10 with other testimony or is consistent with other testimony
11 in the case.

12 In weighing the effect of conflict or discrepancy
13 consider whether it pertains to a matter of importance
14 or to unimportant details and whether it seems to you to
15 result from innocent error or from falsehood. If you
16 find a witness has been mistaken or untruthful, in all or
17 in part of the testimony given, then you may give the
18 testimony of that witness such credit, if any, as you think
19 it deserves in the light of the nature and extent of the
20 defects that you find in it.

21 If you conclude that a witness has knowingly testified
22 falsely concerning any material matter, you have a right
23 to distrust that witness' testimony in other particulars.
24 You may reject all the witness' testimony or give it or parts
25 of it the credence you think it deserves.

Trial Transcript
Charge

2451

1
2 I have sought not to comment on the evidence or to
3 give any impression as to my own view, if I have one, of
4 the relative weight of the evidence. If I have done so,
5 however, you may disregard it entirely for you are the sole
6 judges of the facts.

7 From time to time in the course of the trial objections
8 have been made and rulings on evidence given. Draw no
9 inferences from the comparative frequency of objections of
10 one or the other side or from the comparative record in
11 having objections sustained. Where an objection to a question
12 has been sustained, disregard the question and draw no
13 inferences from its wording about the answer that might
14 have been given. Where an objection is overruled, evidence
15 then received has no special weight just because unsuccessfully
16 objected to.

17 Your verdict must be unanimous.

18 It is your duty as jurors to consult with one another
19 and to deliberate with a view to reaching agreement if you
20 can do so without doing violence to individual judgment.
21 Each of you must decide the case for yourself, but do so
22 only after an impartial consideration of the evidence with
23 your fellow jurors. In the course of your deliberations
24 do not hesitate to reexamine your own views and change
25 your opinion if convinced it is erroneous. Your task is

1
2 one of conscience, and pride of opinion has no place in
3 matters of conscience. But do not surrender your honest
4 conviction as to the weight or effect of evidence solely
5 because of the opinion of your fellow jurors or for the mere
6 purpose of returning a verdict. The form of your verdict,
7 which must be given separately on each Count for each defend-
8 ant, is simple. Your verdict must be either Guilty or Not
9 Guilty, it must be given separately for each Count as to
10 each defendant. and it must be a unanimous verdict on each
11 count as to each defendant. Your verdict need not be the
12 same on all Counts as to any one defendant, nor need the
13 verdict on any Count be the same as to all defendants.

14 Your verdict on each Count will be delivered orally
15 here in open court by your foreman in response to questions
16 which the Deputy Clerk of Court will address to him.

17 You are not partisans - you are judges - judges of
18 the facts. Your sole interest is to ascertain the truth
19 from the evidence in the case.

20 When you have reached a verdict and are ready to
21 report, simply advise the Marshal that you have reached a
22 verdict without disclosing orally or in writing what
23 your verdict is.

24 Your verdict must not be disclosed to anyone before
25 you deliver it orally in the Court Room in response to the
questions of the Clerk of the Court.

Trial Transcript

Charge

[247]

1
2 If you wish to communicate with the Court, do so in
3 writing, using the Foreman, Juror No. 1, as your inter-
4 mediary and representative. Notify the Marshal when you have
5 any such communication.

6 There will now be a short recess during which counsel
7 will review the charge with me to make certain that nothing
8 has been omitted or misspoken. Then you will retire to the
9 jury room to deliberate your verdict.

10
11 * * *
12
13
14
15
16
17
18
19
20
21
22
23
24
25

Trial Transcript

[118]

1
2 THE COURT: There will be no additional charge,
3 members of the jury. As soon as the marshals has been
4 sworn they will take you into their custody. You will
5 retire to deliberate the verdict.

6 Will you come forward, please?

7 (Whereupon, a marshal was sworn by the Clerk
8 of the Court.)

9 THE COURT: All right, members of the jury:
10 You will have the petition and these are the exhibits
11 in the case the marshal will be giving to you. You
12 will now retire to commence deliberation on your
13 verdict. I should set your mind at rest. I will go
14 over that separately. We do not keep jurors here
15 until all hours of the night or anything else.
16 At 5:30 we stop, separate you, go to your homes and
17 come back tomorrow morning to resume your deliberations.

18 We don't believe in putting the pressure of
19 late hours and the threat of locking you up in some
20 strange hotel to get a verdict out of you. We'd
21 rather have a nice deliberate verdict arrived at.

22 All right, now, would you stay with us,
23 Mr. Buchanan and Mr. Puccio? If you want to hear the
24 cassette played over, then could you give a note to
25 the marshal, and come back in and play it over? I

APULSE

Trial Transcript

219

1
2 an sure you can do it yourself, but it's a borrowed
3 machine so we thought maybe it had better be done in
4 here.

5 I thank you for your patient attention to the
6 case and I am sure if you want to find out how it will
7 end you can do it by calling.

8 Are the alternates finished?

9 THE CLERK: Yes, sir.

10 COURT: Your work is done. If you need
11 certificates of attendance to furnish to your
12 employers you can get them downstairs at this time
13 and will one of you come up and get your cards?

14 (Whereupon, the following occurred outside the
15 presence of the jury:)

16 THE COURT: I think the only question I have
17 on the form of the verdict memorandum is whether we
18 should say anything to spell out the complexity on the
19 second charge with respect to the corporation. Or
20 just leave it like that as it were, this will be typed,
21 of course.

22 MR. ROCCO: The only thing, your Honor, the
23 way you have it set up it leaves information and
24 inconsistency of the verdict to your charge, guilty or
25 not guilty, and they can misunderstand your charge in

1
2 some way and say Diapulse Corporation is guilty.

3 THE COURT: The other thing we can do is leave
4 Diapulse of all together, and treat the verdict in view
5 of the instruction as including the corporation -- I
6 think the Government would prefer that. A guilty
7 verdict for one of the officers on one count would be
8 automatic --

9 MR. ROCCO: We have got to think on the way we
10 are trained.

11 THE COURT: The one way you have to think is
12 it's also easier to find the corporation guilty of
13 something, but can be put in, I'll --

14 MR. PANZER: May I consult my client?

15 We accept your Honor's suggestion.

16 THE COURT: All right, good.

17 MR. PANZER: I don't see that we need any
18 notation on that.

19 THE COURT: No. In view of the charge I
20 think they won't extend that. While that much is
21 being typed we can think about your --

22 We can put this footnote on the verdict form
23 if it serves a useful purpose.

24 MR. ROCCO: That is agreeable, your Honor.

25 MR. PANZER: I have no objection.

Trial Transcript

I 251

1
2 THE COURT: All right, gentlemen, would you
3 go in and tell them?

4 Is it satisfactory to you gentlemen that if
5 the jury has any messages that they want to send what
6 we usually do is they hand them to the marshal, the
7 marshal shows them to me, if they seem perfectly
8 innocent, I authorize the marshal to make the phone
9 call or whatever it is. I think the most important
10 one was to get a pack of cigarettes. I am not sure
11 we have any smokers this time. And it now becomes
12 useful for relief marshals to be sworn. If it's all
13 right, Mr. Walsh does that without getting ahold of us,
14 because marshals come and marshals go.

15 (Whereupon, after a short recess the
16 following occurred:)

17 THE COURT: I guess they haven't reached a
18 verdict. We'll send them home.

19 THE CLERK: Your Honor, can the marshal pick
20 their exhibits up and they'll put them in the envelope?

21 THE COURT: I take it, members of the jury,
22 that you have not yet reached a verdict and these
23 questions are something in which we may answer
24 tomorrow. I will discuss them with counsel this
25 evening. You should understand that it's something

1
2 rather new to a lot of juries to separate during their
3 deliberations. Anciently, juries were required to stay
4 together no matter what the hardship until they reached
5 a verdict; as seen by us today, it's far more acceptable
6 to have juries treated humanely and arrive at a
7 verdict which reflects their deliberation on the
8 evidence and not the hardships to which they have been
9 subjected. But it's important that you recognize
10 that many of you go -- you may go home -- it is
11 exceptional and only done in the interest of a better
12 verdict. And it's therefore imperative that you not
13 discuss the case with anyone else, and I think you
14 should realize that only you are competent to decide
15 this case, nobody else has heard the evidence in its
16 entirety. Nobody else has been sworn to decide the
17 case and only you have heard, only the evidence which
18 has been determined to be admissible to the rest of
19 us all have heard things that are not in evidence,
20 and have our heads cluttered with a lot of stuff
21 which doesn't belong in the case.

22 So there isn't anyone else who can possibly
23 be of any assistance to you and any intrusion on your
24 deliberations from the outside would just be
25 mistaken and wrong. So you must be very careful not

1
2 to discuss it with anyone else and do not discuss it
3 in lieu of two or three of you go home together, come
4 in tomorrow together, not to discuss it until we are
5 all together because as sure as shooting two or three
6 of you discussing it, something will be said that will
7 be quite important to some juror not present in his
8 reaching his conclusion or her conclusion.

9 So it has been, once been said it's not going
10 to be repeated, that jurors may never hear it and may
11 have an influence on the verdict. Make sure all your
12 deliberations are deliberations of all of you and duly
13 remember that you have the administration of justice
14 in your trust overnight and I know you will not
15 betray that trust.

16 Tomorrow morning when you get back here at
17 ten o'clock, don't check in first downstairs.
18 Mr. Walsh will take care of the physical end of it,
19 but come directly to the jury room and as soon as
20 you are all there you can resume your deliberations.

21 Good night. Thank you very much.

22 THE CLERK: Jury's message marked as
23 Court Exhibit 1.

24 (Whereupon, the jury left the courtroom and
25 the following occurred outside the presence of the jury:)

Trial Transcript

1 THE COURT: First item is can we have the
2 transcript of the testimony of Joseph Ross and the
3 answer is no, there ain't none, to have it read to him
4 see how popular you are, Mr. Ross, and the second one
5 is it's all we have heard in there, but I think we
6 heard here clarification of Government's Exhibit 1
7 which is the second of the teletype -- it's next to the
8 bill of particulars, isn't it; the Government Exhibit 1
9 paragraph 3 which they quote as saying export
10 shipments, where is that paragraph export shipments
11 are regarded as interstate commerce and thus the firm
12 is an FDA obligation.
13

14 Have you got another copy of the one that was
15 actually marked in evidence?

16 MR. ROCCO: I don't have my file with me, your
17 Honor. I gave a copy to Mr. --

18 THE COURT: I don't see it in the bill of
19 particulars a copy of those things. I do remember
20 seeing some reference to it somewhere, you want to
21 open the exhibit envelope bill?

22 THE CLERK: Yes, sir.

23 MR. ROCCO: Paragraph 3 of Exhibit 1, your
24 Honor.

25 THE COURT: Exhibit 1 is the October 3rd

Trial Transcript

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

teletype; isn't it? 276?

MR. HYMAN: October 3, yes, sir.

MR. MINTZ: . October 3' in the bill of
particulars.

MR. HYMAN: Paragraph 3?

MR. MINTZ: It's the last item in the bill
of particulars.

THE COURT: Person or agent in charge
refuses inspection, begin with that paragraph.

MR. HYMAN: Paragraph 3, your Honor.

THE COURT: If the person or agent in charge
refuses inspection on the basis that the firm is not
engaged in interstate commerce, the investigator
should be informed and that the injunction as well as
the act authorizes the FDA to inspect to determine
the status of the firm. However, even though the
Court has allowed for the expert quotation of these
exportations of these devices, export shipments are
regarded as interstate commerce and thus the firm is
an FDA obligation.

MR. MINTZ: If your Honor please, this paper
may I see?

THE COURT: What?

MR. MINTZ: May I speak?

1

2

THE COURT: Yes.

3

4

MR. MINTZ: This paper was admitted only for the purpose of establishing authorization.

5

6

THE COURT: Not for the purpose of interpreting the decree?

7

MR. MINTZ: That is correct.

8

THE COURT: I agree.

9

10

MR. HYMAN: I agree, but what was the question they asked?

11

12

13

14

THE COURT: Clarification of Government Exhibit 1 to which the part that states that export shipments are regarded as interstate commerce and thus the firm is an FDA obligation.

15

16

MR. MINTZ: I suggest they should be instructed to disregard it.

17

THE COURT: The sentence is obviously garbled.

18

MR. HYMAN: I don't think it's typographical.

19

THE COURT: Does the firm--

20

21

22

23

MR. HYMAN: Meaning that the firm is covered under the Food and Drug Act is a technical way of saying that it's an obligation of the Food & Drug investigators to monitor.

24

25

THE COURT: The meaning of the whole idea of 3 is plain enough, that you can make an inspection to

1
2 determine whether they are shipping interstate
3 commerce. In other words, it seems to infer that an
4 admission that you are an interstate commerce is not
5 a precondition to conducting an inspection. That is
6 the position 3 seems to take.

7 MR. HYMAN: That is exactly the point under the
8 statute, your Honor, the definition of interstate
9 commerce includes exportation.

10 THE COURT: That is not a point, because if
11 you recall in this particular decree as this makes
12 plain elsewhere, the export shipments were not regarded
13 as prohibited shipment, even though they were
14 shipments of prohibited devices as defined in the 3,
15 right?

16 MR. HYMAN: That is correct, your Honor.

17 THE COURT: So to that extent, they weren't
18 involved. This is part of that whole -- only that.

19 MR. HYMAN: I think the Judge knows that that
20 -- that insert that the Court put in to the decree
21 regarding export shipment did not impose a limitation
22 on the inspection provision of 5B.

23 THE COURT: On the inspection, right.

24 MR. HYMAN: Yes.

25 THE COURT: That is what this says, that even

1
2 if allowed exportation, export shipments are in effect
3 nevertheless interstate commerce and you can examine
4 them to determine, etc., etc. I think that they're
5 really troubling their pretty heads over something
6 that has nothing to do with this case.

7 Well, let's think about how we'll answer it
8 overnight.

9 Get here a little early in the morning. Maybe
10 I might -- well, I'll have something for you that I
11 think will be satisfactory. I will figure it out.

12 MR. MINTZ: I am asking the time, your Honor.

13 THE COURT: What is that?

14 MR. MINTZ: What time should we be here?

15 THE COURT: Be here a little before ten and
16 it will be right out.

17 THE CLERK: We can tell the jury tomorrow why
18 we opened the envelope.

19 (Whereupon, an adjournment was taken until
20 June 30, 1976.)

21
22 * * *
23
24
25

Jury's Verdict June 30, 1976

[260]

(Whereupon, at 3:00 p.m. the following occurred in open court:)

THE COURT: We have a message, members of the jury, that you have reached a verdict.

THE CLERK: Mr. Foreman, ladies and gentlemen of the jury, as to the first charge, October 7, 1975, how do you find the defendant Joseph R. Ross, guilty or not guilty?

THE FOREMAN: Guilty.

THE COURT: As to the second charge October 16, 1975, how do you find the defendant Jesse Ross, guilty or not guilty?

[261]

THE FOREMAN: Guilty.

THE CLERK: As to the second charge, October 15, 1975 how do you find the defendant Joseph I. Ross, guilty or not guilty?

THE FOREMAN: Guilty.

THE CLERK: You say you find the defendant guilty as to the first charge and find the defendant Jesse Ross and Joseph I. Ross guilty of the second charge, and so say you all?

THE JURY: Yes.

THE COURT: You wish the jury polled?

MR. MINTZ: Yes, your Honor.

Jury's Verdict June 30, 1976

-12617

THE CLERK: You have heard your verdict as the Court has received it finding the defendant Joseph I. Ross guilty of the first charge and finding the defendant Jesse Ross and Joseph I. Ross guilty of the second charge.

Mr. Foreman, is that your verdict?

THE FOREMAN: Yes, sir.

THE CLERK: Juror No. 2, is that your verdict?

JUROR NO. 2: Yes.

THE CLERK: Juror No. 3 is that your verdict?

JUROR NO. 3: Yes.

THE CLERK: Juror No. 4, is that your verdict? [262]

JUROR NO. 4: Yes.

THE CLERK: Juror No. 5, is that your verdict?

JUROR NO. 5: Yes.

THE CLERK: Juror No. 6, is that your verdict?

JUROR NO. 6: Yes.

THE CLERK: Juror No. 7, is that your verdict?

JUROR NO. 7: Yes.

THE CLERK: Juror No. 8, is that your verdict?

JUROR NO. 8: Yes.

THE CLERK: Juror No. 9, is that your verdict?

JUROR NO. 9: Yes.

THE CLERK: Juror No. 10, is that your verdict?

JUROR NO. 10: Yes.

Jury's Verdict June 30, 1976

[263]

THE CLERK: Juror No. 11, is that your verdict?

JUROR NO. 11: Yes. .

THE CLERK: Juror No. 12, is that your verdict?

JUROR NO. 12: Yes.

THE CLERK: And so say you all.

Sentencing

August 27, 1972

B e f o r e :

HONORABLE JOHN F. DOOLING, JR., U.S.D.J.

Appearances:

DAVID G. TRAGER, ESQ.,
United States Attorney
for the Eastern District of New York

BY: CARL I. STEWART, ESQ.,
Assistant U.S. Attorney

COPAL MINTZ, ESQ.,
150 Broadway,
New York, New York
Attorney for Defendant

Sentencing

1
2 THE COURT: I guess you'd better come forward,
3 Messrs. Ross. Mr. Joseph Ross or Jesse Ross, do you
4 wish Mr. Copal Mintz to represent you on this
5 corporation sentencing?

6 MR. JESSE ROSS: Yes, sir. I would like to make
7 a statement.

8 MR. JOSEPH ROSS: Yes.

9 MR. MINTZ: May I inquire if your Honor has had
10 a chance to read the exceptions to the Probation
11 report?

12 THE COURT: Yes, I have.

13 My first question to you is is there any
14 reason, Mr. Mintz, why sentence should not be imposed
15 this morning?

16 MR. MINTZ: Well, on that issue, I don't think
17 it will be profitable for us to rehash all that has
18 heretofore been urged upon your Honor for the vacator
19 of the conviction, and prior motions to dismiss. So
20 far as that is concerned, all I can say, I repeat
21 what has heretofore been said without actually
22 repeating it.

23 THE COURT: I take it, then, except for the
24 matters which have already been passed upon, there
25 is no reason why sentence should not be imposed?

Sentencing

1
2 MR. MINTZ: Except, as I make the plea for
3 compassion --

4 THE COURT: That's a different matter.

5 Is there anything you wish to say on behalf of
6 the defendants and each of them, with respect to
7 sentence, before sentence is imposed?

8 MR. MINTZ: I do want to present to your Honor
9 considerations in regard to extenuating circumstances.

10 THE COURT: I should say here that I have read
11 your exceptions to the Probation report on Jesse Ross
12 and I should say to you also, and this may save you
13 some effort, that in the peculiar circumstances of
14 this case, I looked at the pre-sentence reports,
15 primarily to satisfy myself that neither of the
16 individual defendants, nor the corporation, had any
17 record, and, of course, we're satisfied that they did
18 not.

19 The nature of the case and my acquaintance
20 with it over the years is such that I didn't think I
21 could give any real attention to the pre-sentence
22 reports, apart from the circumstances which I
23 mentioned.

24 MR. MINTZ: Then I take it, your Honor, that
25 there's no purpose to be served by my rehashing what's

Sentencing

1
2 in my exceptions?

3 THE COURT: No. I take it that Mr. Jesse Ross
4 managed, unintentionally, to antagonize the pre-
5 sentence officer, the Probation officer, and that is
6 reflected in the pre-sentence report.

7 MR. MINTZ: I'm not so sure he antagonized him,
8 except they both were operating under the pressure of
9 time and circumstances and I'm not making any criticism
10 of Mr. Chiman (phonetic) except in the circumstances
11 he has made statements in the report which are not
12 factually correct.

13 THE COURT: I have read your memorandum and
14 the supporting data and none of them is challengeable.

15 MR. MINTZ: Very good, sir.

16 Now, I want to say to your Honor that June 30th
17 obviously was a very sad day for my clients, and also
18 for me and the same is true today. It's especially so
19 because I feel that I must assume that the jury found
20 that the Rosses intentionally and wilfully violated
21 the injunction, knowing that they were doing so --

22 THE COURT: That's what we're all bound by,
23 the jury's verdict, at the moment.

24 MR. MINTZ: I realize that. What I do want to
25 point out, that I know as a fact of personal

Sentencing

1
2 knowledge, that they had no intention, no desire to
3 violate the injunction, and whatever they did, they did
4 in reliance upon my analysis of the judgment and my
5 advice as to what were their obligations as far as
6 disclosure was concerned, and so the situation is
7 whatever punishment your Honor is going to mete out to
8 these two men will be punishing them for following my
9 advice.

10 THE COURT: No, I think that the issue raised
11 by advice of counsel was fairly presented to the jury
12 and passed on by the jury.

13 MR. MINTZ: I except -- well, I'm not so sure
14 there weren't some, if I may say so, some errors in
15 your Honor's charge on that subject, but that's not
16 before --

17 THE COURT: You may well be right, but only the
18 Court of Appeals can satisfy either of us on that
19 point.

20 MR. MINTZ: that's correct. That's why I'm not
21 urging it, but I do point out, certainly, it's an
22 extenuating circumstance, and I assume, your Honor
23 accepts my statement that they relied upon my advice.
24 There's no doubt about that in my mind, and I make
25 that as an absolute, unqualified representation to the

Sentencing

1
2 Court. I hope that my credibility is not an issue.

3 Now, I also respectfully suggest to your Honor
4 that the FDA was more interested in procuring a
5 contempt conviction than in getting access to the
6 records. I say that for several reasons:

7 There was no communication with counsel when
8 the difficulty arose; when the inspectors arrived,
9 they testified that on each occasion they had no
10 equipment whatsoever, other than the forms.

11 Now, how were they going to investigate? How
12 were they going to go through the records and make
13 notes and take copies without equipment to do so?

14 So obviously, it seems to me they went there in
15 the hope that they would be denied access and that
16 would be the basis for commencing this proceeding.

17 Now, also, after the proceeding was brought,
18 Mr. Hyman and I had a conversation in respect to
19 allowing them, the FDA, giving them free access for
20 consideration of withdrawal of the proceeding.
21 Mr. Hyman thought well of it, but he said he had to
22 consult the FDA, and they came back with, "No, we
23 want them prosecuted."

24 Now, had there been any communication, which is
25 customary when an issue arises, when both sides are

Sentencing

represented by counsel, for counsel to discuss it with each other and see if there can be any solution, any agreement as to what is to be done.

In that connection, I want to call your attention to something which I came across quite accidentally a few days ago. The Appellate Division rules of this Department dealing with contempt procedures for violation in the presence of the Court has this to say:

"...except in the case of the most flagrant and offensive behavior, the Court should warn and admonish the person engaged in alleged contumacious conduct that his conduct is contumacious and give him an opportunity to desist before adjudicating him in contempt. Where a person so accused, so warned desists from other offensive conduct, it is ordinarily no occasion for the adjudication of contempt. Where a person is summarily adjudicated and contempt punishment deferred, if such person desists from further offensive conduct, the Court should consider, carefully, whether there's any need for the punishment, for adjudicated contempt."

That is, I think, a marvelous statement of how a person should conduct himself in a situation where there's some question as to whether or not contempt

Sentencing

1
2 has been intended.

3 Now, we have no such thing. It was a perfectly
4 easy matter on the first occasion when the FDA was told
5 what the position of the defendants were, for them to
6 communicate with Mr. Hyman, Mr. Hyman with me and say,
7 "Look, you're wrong. Your advice is wrong." That's
8 the way it should be done. There was no such
9 communication either before the event or after the
10 events, after I've already related to your Honor.

11 So I think there is here a situation of
12 inequitable conduct on the part of the Government and
13 that inequitable conduct on the part of the Government
14 has been made reasons for dismissals of prosecutions.
15 That is the point that I had in mind when I sort of
16 fenced, in response to your Honor's inquiry as to
17 whether I had any reason -- to suggest any reason why
18 sentence should not be --

19 THE COURT: Should not be imposed?

20 MR. MINTZ: Should not be imposed. Thank you,
21 your Honor.

22 Now, the inequitable conduct consists not only
23 of what I've already related to your Honor, but also
24 the very sad fact -- and that is also a fact that the
25 FDA has refused to consider any application of Diapulse

Sentencing

1
2 unless they presented what the FDA regarded as new,
3 scientific evidence, as distinguished from clinical
4 evidence.

5 At the same time, they have approved the
6 labeling of a competitive machine, which, in every
7 respect, is parallel to the Diapulse machine and given
8 them a labeling with extensive claims of therapeutic
9 values.

10 Now, here we have a corporation that's been in
11 existence for a number of years, that has been
12 promoting this machine and the underlying doctrine --
13 and they are forbidden from marketing their product,
14 whereas a competitor is given a free rein. That, I
15 suggest to your Honor, is highly inequitable. It is
16 not an excuse for violating the injunction, I don't
17 urge it as such. It seems to me it is certainly an
18 extenuating circumstance in the sense -- since the
19 Government is the prosecuting party, it is
20 inequitable conduct on their part. It is really an
21 estoppel for a contempt, which is based upon a
22 discriminatory situation.

23 I think that I've suggested to your Honor the
24 considerations which should weigh heavily in your
25 Honor's determination of punishment to be meted out.

Sentencing

1 Would your Honor like me to say anything more
2 or answer some questions? I'll be glad to.

3 THE COURT: No, I think not.

4 The difficulty, of course, is that you no doubt
5 feel required to reiterate positions which you've been
6 taking throughout the litigation and which I have ruled
7 on as the litigation has proceeded.

8 The jury verdict, so far as this Court was
9 concerned at this point, in the case, settles the
10 issue of whether or not it was a contempt and whether
11 or not it was, in the eye of the law, a deliberate
12 contempt.

13 Now, so far as the other questions are
14 concerned about whether the FDA is right or wrong as
15 to their rulings with respect to the Diapulse machine
16 and the circumstances in which and the labeling in
17 which it can be sold, that is a matter to be thrashed
18 out with the FDA. If it errs and it's subject to its
19 action, a non-action are subject to review under the
20 administrative procedure, and it is stupidly,
21 foolishly or without scientific support continuously
22 rejecting any suggestion that there is such a thing
23 as electromagnetic therapy with the inevitable broad
24 claims that follow from it, then that issue must be
25 presented in a FDA review, where the Court could, on

Sentencing

1
2 the evidence for the administrative body make a
3 determination.

4 That, however, is no answer to the action
5 taken in respect to this simple issue on the occasion
6 of the attempted inspection.

7 MR. MINTZ: I fully appreciate the binding
8 effect of the verdict at this point, but I'm now
9 addressing myself to the question of punishment.

10 THE COURT: That I take into account everything
11 that you said.

12 MR. MINTZ: Very well.

13 THE COURT: My views are what is appropriate
14 at this time, are going to be influenced by what you
15 have said and what I expect to hear from Mr. Jesse
16 Ross and Mr. Joseph Ross.

17 MR. MINTZ: I just want to make one observation
18 that part of my statement is occasioned by the
19 material which has developed since.

20 THE COURT: What?

21 MR. MINTZ: Material which has developed since,
22 your Honor, has had to do with this determination, and
23 while it is being urged to bring the matter before
24 your Honor, I do not want to do it while this
25 proceeding was pending. I thought it would be a

Sentencing

1
2 better procedure to have this finished and then we
3 can proceed with other procedures that may be available.
4 But I do urge, your Honor, to at least take into
5 consideration the absolutely good faith of the
6 defendants in what they have done or failed to do or
7 refused to do, particularly that they relied upon me
8 and relied upon my legal advice.

9 Mr. Jesse Ross wants to make a brief statement.

10 THE COURT: Mr. Jesse Ross, is there anything
11 you wish to say with respect to sentencing before the
12 sentence is imposed?

13 MR. JESSE ROSS: Yes, your Honor, I'd rather
14 read this.

15 THE COURT: It's all right. Take your time.

16 MR. JESSE ROSS: I'd like to state that we
17 would not knowingly or willfully violate any law of
18 this country or any other country. We consider an
19 injunction as law and, therefore, would certainly not
20 violate this injunction knowingly or willfully.

21 After eighteen years of harassment, persecution
22 and prosecution by the FDA against Diapulse, we would
23 not write a letter to the FDA or answer a letter from
24 the FDA without consulting our attorney, and it was
25 the same with this injunction.

Sentencing

1 We have, with our attorney's advice and counsel,
2 made sure we complied with each paragraph of the
3 injunction and had him confirm, in writing, every step
4 we should take and did take. This included notifying
5 our doctors and dealers of the injunction, supplying
6 the FDA with proof of mailing and notifying the FDA on
7 research, as well as all other phases required.
8 This included the visits by the inspectors to our
9 office.

10 We have dedicated our lives to bringing a new
11 science to America and the world and to helping relieve
12 some of the suffering which people unnecessarily endure.
13

14 We could have, as a corporation, moved over-
15 seas, but as Americans we would not give up the fight
16 for the American people.

17 In spite of what has occurred, we feel the same
18 today.

19 Thank you.

20 THE COURT: On the jury's verdict of guilty on
21 count or charge 2 of the petition, you, Jesse Ross,
22 are fined \$2,500.

23 Now, is there anything, Mr. Mintz, which you
24 wish to say specifically as applicable to Mr. Joseph
25 Ross?

Sentencing

1 MR. MINTZ: I think not, except to call to your
2 Honor's attention -- but I'm sure it's unnecessary,
3 that even the FDA says his role was minor in comparison.
4

5 THE COURT: Not minor, but subordinate.

6 MR. MINTZ: They may not have used the word
7 "minor," but certainly not of equal --

8 THE COURT: You don't ever call the accounting
9 officer of the corporation minor.

10 MR. MINTZ: I don't mean his position was
11 minor, but his participation --

12 THE COURT: His role.

13 MR. JESSE ROSS: Your Honor, may I interrupt,
14 if I may?

15 THE COURT: Certainly.

16 MR. JESSE ROSS: I have read the --

17 THE COURT: The pre-sentence report?

18 MR. JESSE ROSS: Yes.

19 There's one particular point in that, which I
20 agree 100 per cent with the Probation officer, is the
21 fact that my brother did not do anything that I
22 didn't -- that I wasn't responsible for.

23 THE COURT: I know, but he's a professional
24 man, he's your older brother although you seem to
25 often forget that.

Sentencing

1
2
3 Mr. Ross -- Mr. Joseph Ross, is there any
4 reason why sentence should not be imposed today?

5 MR. JOSEPH ROSS: The only reason I can think
6 of was that there was no intended disrespect upon the
7 law or upon the injunction, and I stand on that.

8 THE COURT: Is there anything you wish to say
9 with respect to sentence before it is imposed,
10 Mr. Ross?

11 MR. JOSEPH ROSS: No.

12 THE COURT: On the jury's verdict of guilty on
13 counts or charges 1 and 2 of the petition, you, Joseph
14 Israel Ross are fined \$625 on each count, making it
15 all \$1,250.

16 Now, as you know, Mr. Mintz, the jury also
17 brought in a verdict, in substance, against the
18 corporation itself.

19 I take it, it is amply represented here this
20 morning by Mr. Jesse Ross, Mr. Joseph Ross and
21 yourself?

22 MR. MINTZ: Yes.

23 THE COURT: Is there anything in particular
24 which you wish to say with respect to the corporation?

25 MR. MINTZ: Well, what I am thinking is it's

Sentencing

1
2 very difficult to differentiate between the corporation
3 and the two individuals before your Honor.

4 THE COURT: Yes, I think that is evident
5 throughout the trial and since the principal officers
6 of the company were involved in the action, it is
7 necessarily a corporate action.

8 MR. MINTZ: I suggest that the fines that are
9 already assessed should suffice without additional
10 fines on the corporation, except, perhaps some
11 nominal amount.

12 May I ask whether \$2,500 is for both counts?

13 THE COURT: You see, in Mr. Ross's -- Mr. Jesse
14 Ross's case the jury's verdict was against him, as I
15 recall, only on one of the two counts.

16 THE CLERK: Yes, sir.

17 THE COURT: You see, he was out of town at the
18 time of the first of the two episodes dealt with in
19 the petition, so he was not found guilty on that one.

20 Mr. Joseph Ross, unfortunately, was there both
21 times.

22 MR. MINTZ: I see.

23 Your Honor hasn't imposed any sentence on the
24 corporation as yet.

25 THE COURT: Not at this point.

Sentencing

1 On the jury's verdict of guilty on the counts
2 of charges 1 and 2 of the petition, Diapulse
3 Corporation of America is fined \$1,250 on each count,
4 making in all, \$2,500.
5

6 Now, as you know, you have a right to appeal,
7 you, Mr. Jesse Ross, Mr. Joseph Ross and both of you
8 on behalf of the corporation have the right to appeal
9 to the Court of Appeals.

10 That appeal must be taken within ten days.

11 I take it that it would be your intention to
12 continue with Mr. Mintz as counsel? I don't want to
13 force you out, Mr. Mintz, or get other employment for
14 Mr. Mintz, but if so, I would assume you would not
15 need the assistance of counsel under the Criminal
16 Justice Act or anything of that sort of thing, but
17 in that, I have confidence and I know this appeal
18 will be served on behalf of all three interests.

19 The only other question is whether there should
20 be a stay of execution and sentence, as here imposed,
21 pending appeal.

22 MR. MINTZ: I respectfully urge that, very
23 strongly. I intend to proceed.

24 THE COURT: I can't imagine the company
25 moving away or even the defendants moving away, can

Sentencing

1
2 you, Mr. Stewart?

3 MR. STEWART: No. We have no strenuous
4 objection to a stay of execution.

5 THE COURT: Then, execution of sentence will
6 be stayed, pending the appeal.

7 I trust that you will file a notice of appeal
8 promptly?

9 MR. MINTZ: I certainly will. I've ordered the
10 minutes two or three days after the verdict.

11 THE COURT: Have they been delivered yet?

12 MR. MINTZ: They have not. Part has.

13 THE COURT: Who was the Court Reporter? Do
14 you know?

15 MR. MINTZ: One is Stalker, I believe.

16 I'm going down there to talk to them about it.

17 THE CLERK: Your Honor, there's a Miss Evelyn
18 Cohen who handles all the Reporters and he chases
19 them --

20 THE COURT: That's the one you'd better go to.

21 THE CLERK: Did the Government have daily copy
22 during the trial?

23 MR. STEWART: I don't know.

24 THE COURT: I don't think so.

25 I take it a notice of appeal will be filed

Sentencing

1
2 today?

3 MR. MINTZ: No, I want to go back to my office
4 and do it leisurely, if I can. Today is Friday. It
5 certainly will be done by Monday.

6 THE CLERK: Whatever bail is involved is
7 continued?

8 MR. STEWART: Is there bail?

9 MR. MINTZ: No bail.

10 THE COURT: I didn't think there was any
11 whatsoever.

12 MR. MINTZ: I thank your Honor for the stay
13 and may I --

14 THE COURT: Yes, sir?

15 MR. MINTZ: Isn't there a \$1,000 limit, Judge?
16 Isn't there a \$1,000 limit on the statute? I'm not
17 certain --

18 THE COURT: On the fine?

19 MR. MINTZ: On the fine.

20 THE COURT: I think not.

21 MR. STEWART: A \$1,000 limit on what?

22 MR. MINTZ: The fine.

23 MR. STEWART: To be imposed, no.

24 THE COURT: I think that's the other one under

25 402.

Sentencing

[202]

MR. MINTZ: I may be confused. There's one that has a \$1,000 limit.

MR. STEWART: If we're talking about Section 401 of Title 18, there isn't.

THE COURT: On 401 there's no limit.

Indeed, just as a matter of interest, there was a case in the Fifth Circuit, in which the District Judge, under 401, imposed a sentence of thirty-five years for a criminal contempt.

The Fifth Circuit, you can be quite sure, did not go along with that.

* * *

I HEREBY CERTIFY THAT THE FOREGOING
IS AN ACCURATE TRANSCRIPT OF THE
MINUTES TAKEN DURING THE ABOVE-
CAPTIONED PROCEEDINGS.

Daniel Clarnick
DANIEL CLARNICK, C.S.R.,
OFFICIAL COURT REPORTER.

RECEIVED
U.S. ATTORNEY

OCT 14 2 55 PM '76

EAST. DIST. N.Y.

Handwritten signature
permanence